314 U.S. 677
(13)

Office - Supreme Court, U. S.
FILED
SEP 29 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 669

HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
Petitioner,

vs.

FAIRMONT SUPPLY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

GEORGE P. BARSE,
Counsel for Petitioner.

JOSEPH A. MEREDITH,
HERSCHEL ROSE, JR.,
of Counsel.

INDEX.

Subject Index.

	Page
I. Opinions of courts below	2
II. Jurisdiction	2
III. Summary statement of the matters involved	2
IV. Specification of errors	8
V. Questions presented	9
VI. Contentions of petitioner	10
VII. Federal question	16
VIII. Finality of Judgment	18
IX. Reasons relied upon for requested allowance of writ	20
Appendix	22

Cases.

Anderson v. *Cronkleton*, 32 F. (2d) 170, 171	11
Bowers, Collector of Internal Revenue v. *American Surety Co.*, 30 F. (2d) 244	14
Brewster v. *Gage* (1929), 280 U. S. 327, 336	12
Brown-Crummer Inv. Co. of Wichita, Kan., et al. v. *City of Florala, Ala., et al.*, 55 F. (2d) 243	14
Clark, Rec. v. *Williard et al.*, 292 U. S. 112	20
Coleman-Bush Inv. Co. v. *Figg*, 95 Ky. 403, 25 S. W. 888	15
Commonwealth v. *Southern Pac. Co.*, 105 S. W. 466-468	14
Copple v. *Morrison* (Iowa, 1935), 264 N. W. 113, 115	15
Earle v. *Pennsylvania*, 178 U. S. 449, 455	11
Erie R. Co. v. *Tompkins*, 304 U. S. 64	13
Ex parte Tiffany (1920), 252 U. S. 32	19
Fatjo v. *Swasey*, 111 Calif. 628, 44 Pac. 225	15
First Trust Co. v. *Airedale Ranch & Cattle Co.* (Nebr., 1939), 286 N. W. 766, 771	15
Fish v. *Olin* (Vt.), 56 Atl. 533, 534, 76 Vt. 120	11
Forgay et al. v. *Conrad*, 6 How. 200, 204	18
Freeman v. *Prendergast*, 94 Ga. 369, 21 S. E. 837, 844	15

Page

Gregory v. *Merchants State Bank* (Tenn., 1939), 135 S. W. (2d) 465, 474 15
Gumbel v. *Pitkin*, 113 U. S. 545 20
Haggin v. *Straus*, 148 Ky. 140, 146 S. W. 391, 395 15
Heath v. *Wallace* (1891), 138 U. S. 573, 582 12
Inland Waterways Corp. v. *Young* (1940), 309 U. S. 517, 524 12
In re Doe's Will (Wisc., 1939), 285 N. W. 764, 767 15
Kennedy v. *Gibson, et al.* (1869), 8 Wall. 498, 506 11
Lahey v. *Kartright* (Court of Appeals, N. Y., 1892), 132 N. Y. 450, 30 N. E. 989, 990 15
McCallum v. *Wing* (C. C. A. 1st, 1929), 30 F. (2d) 505, 510 16
Parkhill v. *Doggett*, 135 Is. 113, 112 N. W. 189, 190 15
Rawlings v. *Ray* (1941), 312 U. S. 96, 99 12
Rhinehart, Receiver v. *Ireland*, 120 W. Va. 599, 199 S. E. 871 7
Rio Grande Ry. v. *Stringham*, 239 U. S. 44 20
Royce v. *Adams*, 123 N. Y. 402, 25 N. E. 386 15
Sadler, Overseer of Poor v. *Jeppson*, 82 Atl. 316-317 14
Safe Deposit & Trust Co. v. *Ellis*, 136 Md. 334, 110 Atl. 481, 483 15
Scott v. *Armstrong*, 146 U. S. 499, 506 11
Seabury, Receiver v. *Green* (1935), 294 U. S. 165, 168 17
Stearns v. *Fraleigh*, 39 Fla. 603, 23 So. 18, 21 15
Stokes v. *Amerman* (Sup. Ct. N. Y., 1889), 7 N. Y. S. 733, 734 15
Strite v. *Wolf*, 268 Pa. 221, 110 Atl. 753, 754 15
Thomas B. Bishop Co. v. *Santa Barbara County, et al.*, 96 F. (2d) 199-203 14
Thomas v. *Nat. Bank of Commerce* (Wash., 1936), 60 Pac. (2d) 264, 269 15
Thomson v. *Dean*, 7 Wallace 342, 345 19
Toronto General Trust Co. v. *Chicago, B. & Q. R. Co.*, 123 N. Y. 37, 25 N. E. 198, 200 15
United States v. *Jackson* (1929), 280 U. S. 183, 193 12
Wooldridge v. *Planters Bank*, 1 Sneed (Tenn.), 297, 302 15

STATUTES.

Page

Section 237(b) of the Judicial Code (U. S. C., title 28, c. 9, Sec. 344(b) 2, 16, 18, 24

Section 5234 of the Rev. Stats. (U. S. C., title 12, ch. 2, Sec. 192) 4, 10, 22

Act of March 29, 1886 (U. S. C., title 12, ch. 2, Secs. 198-200) (Appendix) 11, 12, 22, 23

Act of Congress of February 13, 1925 (U. S. C., title 28, Sec. 780) (Appendix) 14, 24

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 669

HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
Petitioner,

vs.

FAIRMONT SUPPLY COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Your petitioner, Howard Hardesty, as Receiver of The National Bank of Fairmont, West Virginia, respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Appeals of West Virginia, rendered in the above entitled cause on March 15, 1941 (R. 142), rehearing of which was denied May 19, 1941 (R. 167), reversing the judgment of the Circuit Court of Marion County, West Virginia (R. 137-141).

I.

Opinions of Courts Below.

The judgment of the Circuit Court of Marion County, West Virginia, (R. 137-141) is not reported. The judgment of the Supreme Court of Appeals of West Virginia appears in the Record at page 142. The opinion of that court (R. 143-149) is reported in 14 S. E. (2d) 436, and its order denying rehearing, entered May 19, 1941, appears in the Record at page 167.

II.

Jurisdiction.

The time for filing petition for writ of *certiorari* was, by appropriate orders of this Honorable Court, extended to and including September 29, 1941.

Jurisdiction to review the aforesaid judgment of the Supreme Court of Appeals of West Virginia is granted by Section 237(b) of the Judicial Code (U. S. C. title 28, c. 9, sec. 344(b)) providing for the granting of a writ of *certiorari* by this Court to review a final judgment or decree of the highest court of a state in which a decision could be had in which a right, title or privilege is claimed under a statute of the United States.

As will more fully hereinafter appear, petitioner, as Receiver of said national bank, claims, under the national banking laws, the rights, titles and privileges by him asserted and relied upon in the aforesaid cause by him filed.

III.

Summary Statement of the Matters Involved.

Your petitioner, as Receiver of The National Bank of Fairmont, West Virginia, filed suit (R. 1-16) in the Circuit Court of Marion County, West Virginia, against re-

spondent to compel it to perform its contract to purchase from your petitioner, as Receiver of said bank, certain real property constituting assets of the receivership. Petitioner's Bill of Complaint in said court filed, alleged, in substance:

That your petitioner's predecessor, one Robert C. Miller, had, as receiver of said bank, obtained judgment against a debtor of the bank, and thereafter said Miller, as such receiver, filed proceedings to cause the sale of certain real estate belonging to said debtor and to have the proceeds thereof applied towards satisfaction of said judgment (R. 6-10). At the sale of said property by the Special Commissioner appointed by the court for that purpose, said Miller, as such receiver, in pursuance of instructions from the Comptroller of the Currency, and as permitted by the Act of Congress of March 29, 1886 (U. S. C. title 12, c. 2, sections 198-200; appendix, pp. 22, 23, see discussion, *infra,* p. 11) purchased said real estate (R. 10) and the proceeds of the purchase price were duly credited upon said judgment (R. 11). The Special Commissioner, by direction of the court, upon confirmance of said sale, executed deeds of said real estate to said Miller. (The bill of complaint, paragraph VI (R. 11) states that the property was conveyed by said deeds to "R. C. Miller, Receiver * * *", but Exhibits P-S, referred to in said paragraph, show (R. 69-80) that the full name, "Robert C. Miller", was used in said deeds, so that the Special Commissioner's deeds ran to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association".)

That the sale of said real estate to said Miller was: (R. 169)

> "in fact made to said R. C. Miller in his capacity as Receiver of said The National Bank of Fairmont, and which purchase money was in fact paid by said Re-

> ceiver as such from the funds of said The National Bank of Fairmont."

(*The above quoted allegation contained in the bill of complaint was, through inadvertence, omitted from the transcript of record sent to the Supreme Court of Appeals. This omission apparently accounts for the following statement appearing in the opinion of the Supreme Court of Appeals*: (R. 144)

> "It does not clearly appear that the purchase price was paid out of funds belonging to the insolvent banking association."

However, said allegation was brought to the attention of the court in the petition for rehearing (R. 158), *and as will appear from the stipulation of counsel* (R. 169) *said allegation was thereafter specifically brought to the attention of the appellate court and the court thereupon indicated, in substance, that even had the omitted allegation been included in the original transcript, it would not have influenced the court to reach a different decision* (R. 171).)

That thereafter said Miller died, and petitioner was appointed successor receiver of said bank.

In due course, petitioner, by direction of the Comptroller of the Currency (R. 12), sold said real estate to respondent, —Fairmont Supply Company, a corporation,—and a written contract covering said sale was executed by your petitioner, as receiver, and by respondent, and a payment on account was made, the balance to be paid in due course at the closing of the transaction (R. 12; R. 80). Said sale by petitioner was duly approved by the Circuit Court of Marion County, West Virginia, in accordance with the requirements of U. S. C. title 12, sec. 192 (R. 13). Thereupon petitioner tendered respondent appropriate receiver's deeds purporting to convey said property to respondent. Respondent refused to complete the sale on the ground that

petitioner's title, as receiver, was defective, for the reasons hereinafter indicated.

Petitioner, as receiver of said bank, thereupon filed the bill of complaint in the instant case in the Circuit Court of Marion County, West Virginia, to compel specific performance, setting forth, in detail, the previous court proceedings covering the purchase and acquisition of title of said property by said Miller, as receiver, and the subsequent sale of the property by petitioner, as successor receiver, to Fairmont Supply Company.

Respondent demurred to petitioner's bill of complaint (R. 133-137) and therein set up by way of defense that petitioner's bill of complaint did not show that petitioner had such title to said real estate as would enable him to "institute, prosecute and maintain this chancery cause against said defendant" (R. 133), and hence that "defendant as such purchaser would acquire no title or interest in said real estate by acceptance of any deed from said plaintiff."

As grounds for the defense thus made by said demurrer, respondent therein contended:

(a) Said deeds of the Special Commissioner should have conveyed said property to "The National Bank of Fairmont" (R. 136, numbered paragraph 9) and that in the language of said deeds purporting to convey title to said property to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association," the words "Receiver of The National Bank of Fairmont, an insolvent national banking association," were merely descriptive words of Robert C. Miller (R. 135, numbered paragraph 4), and "that by virtue of such conveyances the legal title and equitable title to said real estate vested in Robert C. Miller, individually, and that by reason thereof, neither the said Robert C. Miller in his capacity as Receiver of said The National Bank of Fair-

mont, nor the said bank itself, acquired any title to said real estate, either legal or equitable" (R. 134, numbered paragraph 2).

(b) That upon the death of said former Receiver, the title to said real estate passed and vested in the heirs at law of said Miller (R. 134, numbered paragraph 4).

(c) That even:

> "if it could be legally established that some title or interest in said real estate did pass to and vest in the said Robert C. Miller in his fiduciary capacity as Receiver of said The National Bank of Fairmont, the same has not been by any instrument or operation of law, or in any other way, transferred or vested in said plaintiff, as successor Receiver to the said Robert C. Miller, Receiver of said The National Bank of Fairmont." (R. 134, numbered paragraph 3)

The Circuit Court of Marion County, West Virginia, overruled respondent's demurrer to petitioner's Bill of Complaint, and in effect held that said Robert C. Miller, as Receiver of said bank, had, by said deeds from said Special Commissioner, acquired good title to said real estate in his official capacity as Receiver of said bank, and that Howard Hardesty, your petitioner, as successor Receiver of said bank, obtained good title to said property and could convey good title thereof to the Fairmont Supply Company, as the purchaser thereof from petitioner at the aforesaid auction sale.

Decision of Supreme Court of Appeals of West Virginia.

(The scope and application of the points and issues passed upon and decided in the opinion of the court below, can be fully appreciated only in light of the points certified to that court and enumerated in the "certification order" (R. 2-4). Hence, in enumerating the decided points, reference

will be made, in some instances, to the certified points by way of comment or explanation.)

The Supreme Court of Appeals of the State of West Virginia reversed the Circuit Court and sustained, substantially *in toto,* the points raised in respondent's demurrer. That court held, in effect, that the deeds from the Special Commissioner to Miller, the predecessor receiver, conveyed the title to said property to Miller individually, and not to him in his representative capacity on behalf of the bank, and further, that even if it be assumed that title had passed to Miller in his representative capacity as receiver, said title did not, after the death of Miller and upon the appointment of petitioner, pass to petitioner as receiver, inasmuch as there was no provision in the national banking laws for passage of title by operation of law, from a receiver of a national bank to a successor receiver. More specifically, the court held:

(1) In considering the questions presented, consideration must be given to the effect of appointment of a Receiver of a national bank and the authority and powers of the Receiver so appointed (R. 145).

(2) An insolvent national bank does not lose its corporate existence upon the appointment of a Receiver, and the bank may still enter into transactions not forbidden by law (R. 146).

(3) In the light of the West Virginia case of *Rhinehart, Receiver* v. *Ireland,* 120 W. Va. 599, 199 S. E. 871, a receiver of a state bank has authority to take title in his own name in his official capacity to property purchased by him on behalf of his receivership, but a state bank receiver has "wider powers than those given to the receiver of a national bank. The receiver of a national bank is an agent whose authority is limited by law." (R. 147-148)

(4) Under the law of West Virginia,—"where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually" (R. 147).

Hence, notwithstanding Receiver Miller "was apparently acting in a fiduciary capacity as Receiver of the bank" and even "if he used the funds of his trust in purchasing said real estate" (R. 148), the deeds purporting to convey title to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association" had the effect of conveying legal title to Robert C. Miller, individually.

(Point 3, as certified to the court below, was to the effect (R. 3) that even if it were assumed that title did pass to said Robert C. Miller in his fiduciary capacity as receiver, "there is no statutory provision, *either Federal or State*, transferring legal or equitable title for real estate from a receiver of a Federal bank to a successor receiver of a Federal bank.")

The decision of the court below upon the foregoing certified point was as follows:

(5) There is no "statute which authorizes the receiver of a national banking association to take title from his deceased predecessor by operation of law. There being no such statutory provision, the legal title, upon the death of Miller, passed to his heirs by the laws of descent prevailing in this jurisdiction." (R. 148)

IV.

Specification of Errors.

The court below erred in holding:

(1) That the deeds of the Special Commissioner purporting to convey the real property to "Robert C. Miller, Re-

ceiver of The National Bank of Fairmont, an insolvent national banking association," conveyed legal title of the property of said Miller individually, and not to said Miller in his fiduciary or representative capacity as receiver of said bank.

(2) That under the National Banking Law said Robert C. Miller, as Receiver of said bank, did not have authority to take title to said property, on behalf of and for the benefit of the bank, in his own name in his representative or fiduciary capacity as such receiver.

(3) That even if it be assumed, for discussion, that legal title to said property did pass to said Robert C. Miller, in his fiduciary or representative capacity, and for the benefit of the receivership bank, said title did not, under the national banking laws, pass, by operation of law, to petitioner as successor receiver, and consequently that title to said property passed to the heirs of said Robert C. Miller.

(4) That the operation and effect of said deeds of the Special Commissioner to said Robert C. Miller, were governed by the general law of West Virginia to the effect that "where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually."

V.

Questions Presented.

(1) Under the national banking laws, as construed by the courts, does the receiver of a national bank who has been duly authorized to purchase real property on behalf of his receivership, have capacity and power to take title to said property in his name, in his fiduciary and representative capacity, as receiver of said bank, or must said title

in terms be conveyed to, and in the name of, the receivership bank as a corporation, in order to avoid the consequence of title passing to said receiver in his individual and personal capacity?

(2) Upon the death or resignation of a receiver of a national bank, do the receivership assets pass, by operation of the national banking laws, from the predecessor receiver to his successor?

(3) Does the law of West Virginia, to the effect that: "Where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually", apply to deeds purporting to convey title of real property to a national bank receiver in his fiduciary or representative capacity as receiver?

VI.

Contentions of Petitioner.

(1) Section 5234 of the Rev. Stats. (U. S. C. title 12, ch. 2, sec. 192) provides that upon appointment of a receiver for a national bank, said receiver, under the direction of the Comptroller of the Currency, shall take possession of the assets of said bank, collect and liquidate debts and obligations belonging to it, and, upon the order of the court of record of competent jurisdiction, said receiver may sell all of the real and personal property of the bank; and that all money received by him from such liquidation, shall be paid to the Treasurer of the United States, subject to the order of the Comptroller of the Currency (Appendix, p. 22).

Said statute does not, in terms, specify whether title to the receivership assets shall remain and continue in the national bank as proprietor or owner, or whether title shall pass to the receiver.

However, the decisions of this Court have held, in substance, that title to the assets of the bank pass, by operation of law, to the receiver as a statutory assignee. In *Kennedy* v. *Gibson, et al.* (1869), 8 Wall. 498, 506, this Court said:

> "The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit."

Other cases to the same effect:

Scott v. *Armstrong,* 146 U. S. 499, 506;
Earle v. *Pennsylvania,* 178 U. S. 449, 455;
Fish v. *Olin* (Vt.), 56 Atl. 533, 534, 76 Vt. 120;
Anderson v. *Cronkleton,* 32 F. (2d) 170, 171.

The Act of March 29, 1886 (U. S. C. title 12, ch. 2, secs. 198-200) (Appendix, p. 22) provides, in effect, that when properly authorized by the Comptroller of the Currency and by the Secretary of the Treasury, the Receiver of a national bank may, for the protection of the receivership interests, purchase property at execution sale and may expend the funds of the receivership in payment for the property.

The foregoing statutory provisions do not indicate or specify whether title shall be taken in the name of the receiver in his fiduciary or representative capacity, or whether title shall be taken in the name of the national bank as a corporation.

Examination of the authorities indicates that apparently this question has not been passed upon by the courts. However, it would seem necessarily to follow that inasmuch as it has been decided by this Court by the cases above

cited, that title to the assets of the receivership bank passes to the receiver as statutory assignee, and that suits on behalf of the bank may be brought in the name of the receiver, the conclusion should also be reached that under said Act of March 29, 1886, *supra*, it was intended, or at least permitted, that title to the property thus purchased could be taken in the name of the receiver in his fiduciary or representative capacity as receiver.

It has long been the construction of said Act of March 29, 1886 by the Comptrollers of the Currency, and, in consequence thereof, it has long been the settled practice, that title to real property acquired under authority of said statute should be taken in the name of the receiver in his fiduciary or representative capacity, rather than in the name of the bank as a corporation.

This Court has uniformly held that great weight may properly be given to settled construction of a statute by the Executive Department charged with its administration, and that such construction should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson* (1929), 280 U. S. 183, 193; *Heath* v. *Wallace* (1891), 138 U. S. 573, 582; *Brewster* v. *Gage* (1929), 280 U. S. 327, 336; *Inland Waterways Corp.* v. *Young* (1940), 309 U. S. 517, 524; *Rawlings* v. *Ray* (1941), 312 U. S. 96, 99.

No question is raised concerning the fact that receiver Miller had been duly authorized to purchase the real property in question and to pay for the same from the funds of the receivership. (*Supra*, p. 3).

In view of the foregoing, it would seem clear that the general rule of property law of West Virginia to the effect that "Where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually", has no application to

the deeds executed to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association". The doctrine established by cases such as *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, does not require, nor permit, under the circumstances of the instant case, that the aforesaid rule of West Virginia property law apply to the aforesaid deeds.

(2) There is no provision in the national banking laws specifically indicating that upon the death or resignation of a receiver of a national bank, the title to the receivership assets shall pass to and vest in the successor receiver.

Examination of the reported cases seems to indicate that there are no decisions of this Court, or any other court, passing upon this question.

It has long been the position of the Comptrollers of the Currency, that upon the death or resignation of a receiver of a national bank, the title to the assets acquired by said receiver as statutory assignee, does pass, by operation of the national banking laws, to his successor receiver. Under the doctrines established in the cases previously cited, *supra* (p. 12) it would seem that this interpretation and construction of the law by the Comptroller should not be disturbed. It is obvious that a contrary interpretation or construction to the effect that title does not pass from a receiver to his successor receiver, by operation of law, and that deeds of conveyance from the predecessor receiver, or his heirs, must be obtained, or that suits to establish title in the successor receiver must be filed, would seriously interfere with the liquidation of the receivership. A construction of the law having such consequences should not be adopted unless the previous position was clearly wrong, or unless a different construction is plainly required.

The sound construction of the law upon this point would seem to be that title to the receivership assets is, in legal

effect, attached to, and vested in, the official office of receiver, and that changes from time to time in the incumbents of that office do not change or affect the situs of title and consequently that each successor receiver in turn takes title as substituted statutory assignee.

Some help, in this connection, would seem to be derived, by analogy, from the provisions of section 11(a) of the Act of Congress of February 13, 1925 (U. S. C. title 28, c. 18, secion 780, appendix, p. 24) wherein it is provided, in effect, that upon the death or resignation of an officer of the United States during the pendency of a suit relating to the discharge of the official duties of such officer, the court may permit the substitution of the successor in office of such officer. This statutory provision seems to recognize that the cause of action, and the rights incident thereto, are vested in the official office of said public officer, and not in said officer individually or personally. The following cases, construing said statute or similar statutes, seem to support this construction:

Bowers, Collector of Internal Revenue v. *American Surety Co.*, 30 F. (2d) 244;
Brown-Crummer Inv. Co. of Wichita, Kan., et al. v. *City of Florala, Ala., et al.*, 55 F. (2d) 243;
Sadler, Overseer of Poor v. *Jeppson*, 82 Atl. 316-317;
Commonwealth v. *Southern Pac. Co.*, 105 S. W. 466-468;
Thomas B. Bishop Co. v. *Santa Barbara County, et al.*, 96 F. (2d) 199-203.

It is settled doctrine that the receiver of a national bank is an officer of the United States, and is the agent or representative of the Comptroller of the Currency, for the purpose of the administration of the receivership bank, and for the liquidation of its assets. See *Kennedy* v. *Gibson, et al.*, and other cases, cited, p. 11, *supra.*

It is a general rule that the title, rights and powers of a trustee are annexed to the office, so as to pass to, and be capable of being dealt with and exercised by, a successor of the original trustee, without any conveyance or assignment to the new trustee by the retiring trustee. *Lahey* v. *Kartright* (Court of Appeals, N. Y. 1892) 132 N. Y. 450, 30 N. E. 989, 990; *Copple* v. *Morrison,* (Iowa, 1935) 264 N. W. 113, 115; *In re Doe's Will* (Wisc. 1939) 285 N. W. 764, 767; *First Trust Co.* v. *Airedale Ranch & Cattle Co.* (Nebr. 1939) 286 N. W. 766, 771; *Thomas* v. *Nat. Bank of Commerce,* (Wash. 1936) 60 Pac. (2d) 264, 269; *Gregory* v. *Merchants State Bank,* (Tenn. 1939) 135 S. W. (2d) 465, 474; *Stearns* v. *Fraleigh,* 39 Fla. 603, 23 So. 18, 21; *Coleman-Bush Inv. Co.* v. *Figg,* 95 Ky. 403, 25 S. W. 888; *Stokes* v. *Amerman* (Sup. Ct. N .Y. 1889) 7 N. Y. S. 733, 734; *Fatjo* v. *Swasey,* 111 Calif. 628, 44 Pac. 225.

In the absence of a clear intention to the contrary, the power of sale conferred on a trustee is annexed to the office and passes to any person lawfully substituted in the place of the original trustee. *Lahey* v. *Kartright* (Court of Appeals N. Y. 1892) 132 N. Y. 450, 30 N. E. 989, 990; *Freeman* v. *Prendergast,* 94 Ga. 369, 21 S. E. 837, 844; *Haggin* v. *Straus,* 148 Ky. 140, 146 S. W. 391, 395; *Safe Deposit & Trust Co.* v. *Ellis,* 136 Md. 334, 110 Atl. 481, 483; *Strite* v. *Wolf,* 268 Pa. 221, 110 Atl. 753, 754; *Royce* v. *Adams,* 123 N. Y. 402, 25 N. E. 386.

The courts have held that on appointment of a new trustee, title to the trust property vests in him by virtue of the appointment, and without necessity of a formal conveyance. *Thomas* v. *Nat. Bank of Commerce,* (Wash. 1936) 60 Pac. (2d) 264, 269; *Gregory* v. *Merchants State Bank,* (Tenn. 1939) 135 S. W. (2d) 465, 474; *Freeman* v. *Pendergast, supra; Parkhill* v. *Doggett,* 135 Ia. 113, 112 N. W. 189, 190; *Toronto General Trust Co.* v. *Chicago, B. & Q. R. Co.,* 123 N. Y. 37, 25 N. E. 198, 200; *Woodridge* v.

Planters Bank, 1 Sneed (Tenn.) 297, 302; *McCallum* v. *Wing*, (C. C. A. 1st, 1929) 30 F. (2d) 505, 510.

VII.

Federal Question.

It would seem clear that the instant case raised Federal questions within the purview of Sec. 237 (b) of the Judicial Code.

Respondent, in denying the acquisition of title to the real property by petitioner, and in denying that the receiver's bill of complaint presented a cause of action to compel respondent to perform specifically the contract of sale, raised certain points in his demurrer (R. 133-137), which points in turn, by reason of the decision of the trial court against respondent,—were reproduced and set forth in the "Certification Order" presented to the court below (R. 2-5). As previously indicated herein under "Questions *Presented*", *supra*, p. 9, respondent contended, and the court below ruled, that under the national banking laws, petitioner's predecessor, as receiver, did not have capacity or power to take title to the real estate in his name, even though taken in his name in his fiduciary or representative capacity, and that title passed to receiver Miller individually. The point was also made, in this connection, that under the national banking laws, title should have been taken in the name of the bank as a corporation.

It was further contended by respondent, and ruled by the court below in favor of respondent, that even if it were to be assumed that legal title to the property did pass to petitioner's predecessor in his fiduciary or representative capacity, there was no provision in the national banking laws whereby title passed or could pass, by operation of law, from petitioner's predecessor to petitioner as successor receiver.

On the other hand, petitioner contended that under the settled construction of national banking law, title to real estate purchased on behalf of the receivership, with receivership funds, by direction of the Comptroller of the Currency and the Secretary of the Treasury, could lawfully be acquired by the receiver in his fiduciary or representative capacity; and that upon the death or resignation of a receiver, title passed by operation of the national banking laws to his successor receiver.

It was also contended by respondent, and ruled in its favor by the court below, that the effect and operation of the deeds in question were governed by West Virginia laws and that under said law title passed to petitioner's predecessor in his individual capacity and hence thereafter passed to heirs at law of petitioner's predecessor. *On the other hand, petitioner contended that these questions were controlled by the national banking laws, as interpreted and construed by the courts.*

As previously herein pointed out, *supra*, p. 7, the decision of the court below was predicated primarily on its construction and interpretation of the national banking law, and in its opinion (R. 145) the court stated:

> "In order that the questions involved in this certificate may be properly discussed, it is necessary to consider the effect of the appointment of a receiver for a national banking association by the Comptroller of the Currency, as well as the authority and powers of the receiver so appointed."

This Court has held that where the receiver of a national bank claims rights under the national banking laws, and such rights were denied by a State court, a Federal question is involved. *Seabury, Receiver* v. *Green* (1935), 294 U. S. 165, 168.

VIII.

Finality of Judgment.

It would seem clear that the judgment of the court below is final within the purview of Sec. 237(b) of the Judicial Code.

Petitioner, by the bill of complaint in the instant case, set forth therein, fully and completely the derivation of title of the property in question, and the alleged accrual and vesting of said title in petitioner, and sought to compel respondent to carry out its contract for the purchase of said property. Respondent, for the reasons hereinbefore indicated, denied petitioner had title to said property, and denied, therefore, the claim or right of petitioner to compel respondent to perform said contract and purchase said property. The court below sustained the contention of respondent and held that petitioner, as receiver of the bank, did not have title to the property, and further, by necessary implication and inference, held that the bank did not have title to said property, and accordingly decided that petitioner could not compel specific performance of the contract.

The merits of the case, involving the claim of title by petitioner, and the denial of title by respondent, were thus adjudicated by the court below upon the merits, and nothing remained to be done by the trial court, so far as respondent's liability was concerned. The judgment of the court below thus disposed completely of the controversy.

The decisions of this Court have established that where title to property is decided upon the merits by the highest court of a State, such decision is final. As stated by this Court in *Forgay et al.* v. *Conrad,* 6 How. 200, 204:

> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is

entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

The question of finality of judgment, so far as right of appeal was concerned, was in issue in *Ex Parte Tiffany*, (1920) 252 U. S. 32. The language of the opinion of this Court is applicable by analogy to the instant case.

"By the Judicial Code, sec. 128, the Circuit Court of Appeals is given appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, with certain exceptions not necessary to be considered. It is clear that the order made in the District Court refusing to turn over the property to the chancery receiver was a final decision within the meaning of the section of the Judicial Code to which we have referred, and from which the chancery receiver had the right to appeal to the Circuit Court of Appeals. By the order the right of the state receiver to possess and and administer the property of the corporation was finally denied. The words: 'final decisions in the district courts' mean the same thing as 'final judgments and decrees' as used in former acts regulating appellate jurisdiction. Loveland on Appellate Jurisdiction of Federal Courts, sec. 39. This conclusion is amply sustained by the decisions of this court. *Savannah* v. *Jesup*, 106 U. S. 563; *Gumbel* v. *Pitkin*, 113 U. S. 545; *Krippendorf* v. *Hyde*, 110 U. S. 276, 287. See also a well considered case in the Circuit Court of Appeals, Ninth Circuit—*Dexter Horton National Bank* v. *Hawkins*, 190 Fed. Rep. 924."

In ruling upon this question in *Thomson* v. *Dean*, 7 Wall. 342, 345, the court said:

"So far as the court below was concerned, the decree in the case determined the principal matter in con-

troversy between the parties. *And since the decree could not be changed except through a new and distinct proceeding, it determined that matter finally.*" (Italics inserted.)

Also see: *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44; *Gumbel* v. *Pitkin*, 113 U. S. 545; *Clark, Rec.* v. *Williard, et al.*, 292 U. S. 112.

IX.

Reasons Relied Upon for Requested Allowance of Writ.

(1) The decision of the court below, to the effect that a receiver of a national bank cannot take title in his own name in his representative or fiduciary character as receiver, of real estate acquired on behalf of the receivership during the course of liquidation—would seem to be directly in conflict, in principle, with the decisions of this Court in the case of *Kennedy* v. *Gibson, et al.*, and of the other cases, cited on p. 11 hereof, to the effect that the receiver is a statutory assignee of the assets of a national bank and that title to such assets passes to him as receiver.

The decision of the court below, to the effect that under the national banking laws title to assets of the receivership does not pass, by operation of law, to a successor receiver, would likewise seem contrary to the principles established by the aforesaid cases cited on pp. 14-15 hereof, and in *Kennedy* v. *Gibson, et al., supra*, p. 11.

(2) However, examination of the authorities, seems to indicate that neither of the foregoing points has heretofore been specifically passed upon by this Court, and the questions would seem to be of such general importance, incident to the interpretation and construction of the national banking laws, that this Court should grant the writ of *certiorari* for the purpose of settling the law.

(3) As indicated in the discussion herein, *supra*, p. 12, it has long been the established construction and interpreta-

tion by the Comptroller of the Currency of the national banking laws upon the foregoing points, that title may properly be taken by receivers of national banks of real estate acquired by them, and that, upon the death or resignation of a receiver, title to the receivership assets passes, by operation of law, to his successor receiver.

Many parcels of real estate thus acquired, by receivers of national banks all over this country, have been sold.

If the decision of the court below is permitted to stand, serious doubt upon the validity and effectiveness of titles to real estate thus acquired and thus sold by receivers of national banks will result. In this connection, attention is also directed to the statements in the petition for rehearing (R. 150-152) concerning the effect of the decision.

It is believed that these consequences are of such importance that this Court may well feel justified in granting the review.

(4) The decision of the court below, as applied in the instant case, seriously affects the administration by the Comptroller of the Currency of the national banking laws relating to the liquidation of national banks in receivership, and, therefore, in the interest of future guidance of the Comptroller in these respects, it is believed the law should be settled by an authoritative decision from this Court.

Respectfully submitted,

GEORGE P. BARSE,
Attorney for Petitioner.

JOSEPH A. MEREDITH,
HERSCHEL ROSE, JR.,
Of Counsel.

APPENDIX.

U. S. C. Title 12, ch. 2, sec. 191.

General grounds for appointment of receiver.

• • • or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192. (June 30, 1876, c. 156, sec. 1, 19 Stat. 63.)

U. S. C. Title 12, ch. 2, sec. 192.

Default in payment of circulating notes.

• • • Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. • • •

U. S. C. Title 12, ch. 2, sec. 198.

Purchase by receiver of property of bank; request to comptroller.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property,

real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (Mar. 29, 1886, c. 28, sec. 1, 24 Stat. 8.)

U. S. C. Title 12, ch. 2, sec. 199.

Approval of request.

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. (Mar. 29, 1886, c. 28, sec. 2, 24 Stat. 8.)

U. S. C. Title 12, ch. 2, sec. 200.

Payment.

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: *Provided, however*, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency

direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order. (Mar. 29, 1886, c. 28, sec. 3, 24 Stat. 8.)

U. S. C. Title 28, ch. 9, sec. 344(b).

* * * (b) It shall be competent for the Supreme Court, by certiorari to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; * * *

Section 11(a) of the Act of Congress of February 13, 1925 (U. S. C. title 28, sec. 780).

"That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

y,
r-
.)

ıe
to
ıd
of
as
in
ıy
or
y
r-

3,

r
ıl
e
ıl
g
h
e,
t,
t
e
n
h
o
g
n

(14)

Office - Supreme Court, U. S.
FILED
NOV 3 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

NO. 669

HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
Petitioner,

VS.

FAIRMONT SUPPLY COMPANY, A CORPORATION,
Respondent.

RESPONDENT'S OPPOSING BRIEF TO SUPPORTING BRIEF INCLUDED IN PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Eli Whitney Debevoise
TUSCA MORRIS
ROBERT C. MORRIS
Counsel for Respondent,
FAIRMONT SUPPLY COMPANY,
A CORPORATION.

FAIRMONT PRINTING CO., FAIRMONT, W. VA.

INDEX

SUBJECT INDEX

	Page
I. Statement	1
II. Questions Presented	2
III. Jurisdiction	3
IV. Summary of Matters Involved	5
V. Decision of Supreme Court of Appeals of West Virginia	8
VI. Argument	10
Point 1—Non-Federal Grounds	10
(A) These Four (4) Deeds, Exhibits "P," (R. 69), "Q," (R. 72), "R," (R. 75) and "S," (R. 77) with Bill of Complaint, are not Ambiguous	10
(B) Whereas Clauses in the Four (4) Deeds	12
(C) The Vice of the Four (4) Deeds	13
(D) The phrase, "Receiver of The National Bank of Fairmont," is Simply *Descriptio Personae* of the Grantee	14
(E) The Law of the Situs of Real Property, *Lex Rei Sitae*, Determines the Validity of the Conveyances thereof, Wherever Made	17
Point 2—Federal Grounds	20
Point 3—The Chancery Cause Presents a Case for Establishment of a Trust for the Benefit of the Bank	22
Point 4—The Case Determined on Certified Record	24
VII. Grounds Relied upon for Disallowance of Writ	25
Conclusion	27
Appendix	30

CASES

	Page
Abilene National Bank v. *Dolly, Com'r.*, 179 F. 461; 32 L. R. A. (N. S.) p. 1065	22
Adams v. *Russell*, 229 U. S. pp. 358, 359	19
Ancient Egyptian Order v. *Michaux*, 279 U. S. pp. 744, 745	19
Ayres v. *Polsdorfer*, Vol. 187 U. S. p. 584	19
Bank v. *Burdette*, 61 W. Va. p. 637	8
Barker v. *Temple Lumber Co.* 12 S. W. (2d) 180	15
Collins v. *Treat*, 108 W. Va. p. 443	11
District of Columbia v. *Wardell*, 32 F. Supp. 771	25
Donahue v. *Rafferty*, 82 W. Va. p. 535	15
Doyle v. *Atwell*, 261 U. S. p. 592	19
First National Bank in St. Louis v. *State of Missouri*, 263 U. S. 640	24
Fowler et al. v. *Coates et al*, 94 N. E. 997	15
Fox Film Corp. v. *Muller*, 296 P. S. pp. 209, 210	19
Greenfield v. *Stout*, 50 S. E. p. 112	15
Griffin v. *Coal Co.* 59 W. Va. 480	11
Hanson v. Blake, Adm'r. 63 W. Va., pp. 560, 561, 562	15
Howard Hardesty, Receiver, etc. v. Fairmont Supply Co., 14 S. E. p. 438	2
Hart et al. v. *Seymour et al.* 35 N. E. 246	15
Honeyman v. *Hanan*, 300 U. S. p. 14	19–26
Hyman v. *Swint*, 94 W. Va. 627, Syllabus 1	14
Inland Waterways Corporation v. *Young*, 60 S. C. R. 646, 647; 309 U. S. 517	27
Irving Trust Co. v. *Maryland Casualty Co. et al*, 84 F. p. 168	19
Johnson v. *Risk*, 137 U. S. p. 300	19
Jones v. Coal Co. 79 W. Va. p. 539	11
Kanenbly et al. v. *Volkenberg et al*, 75 N. Y. S. p. 8	15
Kennedy v. *Gibson et al*, 8 *Wall.* 498, 506	24
Kuhn v. *Coal Company*, 215 U. S. 356	8, 9

	Page
Love v. Love et al, 83 Pac. 201	15
McCoy v. *Shaw*, 277 U. S. p. 303	19
Nagle v. *Herold*, 30 F. Supp. p. 905	21
National Bank v. *Commonwealth*, 9 Wall. 353, 362	21
Paxton v. *Oil Co.* 80 W. Va. pp. 77, 78	11
Pfeiffer v. *Rheinfrank*, 2 App. Div. pp. 574, 575, 576; 37 N. Y. S. pp. 1076, 1077, 1078	15
Sansom v. *Ayer & Lord Tie Co.* 139 S. W. 778	15
Schofield v. *Baker*, 212 F. p. 504	25
State v. Gray, 111 So. 243	15
Strother v. *Nat'l. Bank*, 113 W. Va. pp. 77, 78	11
Swick v. *Rease*, 62 W. Va. 560	23
Thompson & Lively v. *Mann*, 53 W. Va. pp. 435, 436	15
Title Guarantee & Trust Co. v. *Fallon et al*, 91 N. Y. S. p. 497	15
Trahern v. *Woolwine*, 109 W. Va. p. 629	11
Trans. Co. v. *Pipe Line Co.*, 22 W. Va. p. 614	11
Trust Co. v. *Crawford & Ashby*, 69 W. Va. p. 115	15
Uhl v. *Ohio River Railroad Company*, 51 W. Va. pp. 106, 107	11
United States v. *Hastings*, 296 U. S. p. 188	19
Whelan v. *Blankenbeckler*, 87 F. (2d) 82	25
White v. *Leovy, Vol.* 174 U. S. pp. 95, 96	19
Williams Pocahontas Coal Co. v.*Berwind Land Co.*, 76 F. p. 323	L 11
Wittnebel v. *Loughman*, 80 F. (2), p. 224, 9 F. Supp. p. 467	13

TEXTBOOK

18 C. J., Chapter VI, Sec. 240, pp. 275, 276	15

STATUTES

	Page
U. S. C. A. Title 28, C. 9, Sec. 344 (b)	3
U. S. C. A. Vol. 28, Rule No. 35, p. 424	4
U. S. C. A. Title 12, Secs. 198, 199, 200	6, 22, 25, 30, 31
U. S. C. A. Title 12, Secs. 191, 192	25
U. S. C. A. Title 28, Supreme Court Rules, Sec. 7, Rule 11, pp. 400-401	28
W. Va. Official Code 36-1-11	27, 31
W. Va. Official Code 37-1-17	28, 31, 32
W. Va. Official Code 36-1-4	23

Supreme Court of the United States

OCTOBER TERM, 1941

HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
Petitioner,
vs.
FAIRMONT SUPPLY COMPANY, A CORPORATION,
Respondent.
NO. 669

RESPONDENT'S OPPOSING BRIEF TO SUPPORTING BRIEF INCLUDED IN PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

I.

STATEMENT

The Fairmont Supply Company, a corporation, respondent herein, resists the legal contentions of the petitioner as set forth in his supporting brief, included in his petition addressed to this Court for a writ of *certiorari* to the Supreme Court of Appeals of West Virginia to review the final judgment in the chancery cause recently pending in that Court, styled *"Howard Hardesty, as Receiver of The National Bank of Fairmont, an insolvent national banking association, Plaintiff, v. Fairmont Supply Company, a corporation, Defendant,"* wherein the Supreme Court of Appeals of West Virginia rendered its decision on March 15,

1941, (R. 142), and denied a rehearing thereof on May 19, 1941, (R. 167), and opposes the granting of the prayer of the petitioner's petition filed herein, and assigns legal grounds for such resistance and opposition, stated appropriately in respect to certain subjects discussed in petitioner's petition and supporting brief, which are more or less intermingled together as one paper.

II.

QUESTIONS PRESENTED

(1) Whether under the laws of the State of West Virginia, the three points of law decided in the judgment (R. 142) of the Supreme Court of West Virginia and stated in its syllabus of the case, to-wit:

> "1. Whether a conveyance of land passes a legal or equitable estate therein is determined by the law of the state where the land is situated.
>
> "2. Where a deed conveyed land to 'R. C. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association', legal title to the land described therein passed to the receiver as an individual.
>
> "3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver as an individual, does not pass to his successor by operation of law."
>
> (R. 143, 14 S. E. (2d) 438),

are non-federal questions and the decision upon them is broad enough to maintain the judgment and constitutes a full and final determination of the cause.

(2) Whether the collateral questions discussed in the opinion of the Court (R. 142), but not decided in or referred to in its syllabus, to-wit:

> 1—That the Receiver of The National Bank of Fairmont is without authority to take title by deed to the real estate involved, when and if purchased by him in his fiduciary capacity, unless a trust is created therein in favor of the Bank, and
>
> 2—That the present Receiver, petitioner herein, of The National Bank of Fairmont is without authority to take title to such real estate by operation of law from his deceased predecessor, if any title to the land vested in his predecessor receiver.
>
> (R. 143, 14 S. E. (2d) 438),

are federal questions, and, if found to be federal questions, whether their disposition is necessary or unnecessary for a final determination of the cause.

III.

JURISDICTION

Under Judicial Code (U. S. C. A. Title 28, C. 9, Sec. 344 (b)), providing for the granting of a writ of *certiorari*, it is contended that this Court does not have jurisdiction to review the aforesaid judgment of the Supreme Court of Appeals of West Virginia, because no "title, right, privilege or immunity is specially set up or claimed by either party under * * * any statute of * * * the United States." When the Supreme Court of West Virginia rendered its opinion in these three major particulars, to-wit:

> *First*, "The alienation and transfer of real estate is governed by the law of the state in which the land is located," (R. 146, 14 S. E. (2d) 435),

Second, "In this state it has been held that where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually," (R. 147, 14 S. E. (2d) 438), and

Third, "Upon the death of a receiver of an insolvent national banking association, the legal title to land, held by a receiver as an individual, does not pass to his successor by operation of law," (R. 143, 14 S. E. (2d) 436),

there was eliminated any and all federal questions of substance, (U. S. C. A. Vol. 28, Rule No. 35, p. 424).

The above quoted parts of the Court's opinion definitely decided the chancery cause. They were the three major controversies in the case and, when the Court found under the real property law of West Virginia that "Receiver of The National Bank of Fairmont, an insolvent national banking association," was simply *descriptio personae* of Robert C. Miller, grantee therein, and that the legal title to the land vested in him individually, which as such does not pass to his successor receiver, all other questions raised on the demurrer to the bill of complaint and certified to the Supreme Court of West Virginia became simply collateral matters and any decisions on them simply were tantamount to an *obiter dicta*, and were not necessary to the final determination of the cause.

When the Supreme Court of Appeals of West Virginia definitely decided these three major questions, the subsequent questions raised in the Court's opinion to the effect that—

1—The Receiver of The National Bank of Fairmont is without authority to take title by deed to the real

estate involved, when and if purchased by him in his fiduciary capacity, unless a trust is created therein in favor of the Bank, and

2—The present Receiver, petitioner herein, of The National Bank of Fairmont is without authority to take title to such real estate by operation of law from his deceased predecessor, if any title to such real estate vested in his predecessor receiver,

(R. 143, 14 S. E. (2d) 438),

became decisions on irrelevant and non-essential matters. The Court went out of its way to express its opinion on these two minor points. They neither add to nor subtract from the decision on the three main questions. They lack the force of adjudication.

IV.

SUMMARY OF MATTERS INVOLVED

Petitioner's petition and supporting brief make a fair statement of the matters involved for a writ of *certiorari*, except in one particular. The certified bill of complaint to the State Court in the chancery cause omitted this allegation (R. 169):

"In fact made to said R. C. Miller in his capacity as Receiver of said The National Bank of Fairmont, and which purchase money was in fact paid by said Receiver as such from the funds of said The National Bank of Fairmont,"

which was restored to the record by stipulation (R. 169-170-171). It is conceded that the receiver of an insolvent national bank may, under certain conditions, restrictions and limitations, purchase property at an execution sale out

of the bank's funds for the bank (U. S. C. A. Title 12 of Sections 198, 199 and 200). These sections of the federal statute are cited because it is only by virtue of a compliance with them that Robert C. Miller, Receiver of The National Bank of Fairmont, could have legally purchased the lots in question.

Note the necessary steps to be taken under these sections (U. S. C. A. Title 12, Sections 198, 199 and 200, Appendix pp. 30-31):

1st. The receiver must "find it in his opinion necessary to fully protect and benefit his trust * * *."

2nd. He must certify the facts in the case, together with his opinion as to the value of the equity his trust may have in the same to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of the trust as may be necessary to purchase such property.

3rd. The Comptroller must approve the request and certify the facts and his approval of the request to the Secretary of the Treasury.

4th. The Secretary of the Treasury must approve the request and file all papers relating thereto.

5th. Upon compliance of the foregoing, the Comptroller is authorized with the approval of the Secretary of the Treasury to empower the receiver to make the purchase and pay for the property out of the funds of the bank.

There is not a single allegation in the bill of complaint that any one of these necessary and vital steps was taken or followed by Robert C. Miller, Receiver of The National Bank of Fairmont, in the purchase of these lots.

The State Court in its opinion stated:

> "It does not clearly appear that the purchase price was paid out of funds belonging to the insolvent banking association."

This conclusion of the Court was proper and justifiable when it was so apparent from the record that Robert C. Miller, Receiver of The National Bank of Fairmont, had no direction, authority or power to use the funds of the Bank to purchase these lots. But the pertinent and logical reason for the statement of the State Court that its opinion would not have been influenced to reach a different decision (R. 171), when its attention was called to the fact that there had been omitted from the certified bill of complaint an allegation that the funds of the Bank had been used by R. C. Miller in his fiduciary capacity as Receiver to purchase the lots, is that its decisions on the three major points, to-wit:

> (1) Land titles are governed by the law of the state in which the land is situated;
>
> (2) Where a land conveyance by deed is made to a person whose name is followed by an official title or the name of an office, the title or office is merely *descriptio personae* of the grantee, and title to the land vests in the grantee individually; and
>
> (3) Upon the death of a receiver of an insolvent national banking association, the title to the land, held by the receiver as an individual, does not pass to his successor by operation of law,

definitely settled the instant case and any further consideration of the two minor points became questions of no substance, and any further adjudication of them by the State Court would have been a vain thing. Finality to the cause was achieved, when the three major questions were adjudicated.

V.

DECISION OF SUPREME COURT OF APPEALS OF WEST VIRGINIA

The syllabus of the State Court is the law of the case in West Virginia, whatever may be the reasoning in the opinion. *Kuhn* v. *Coal Company*, 215 U. S. 356. In examining the syllabus in respect to the opinion of the Supreme Court of Appeals of West Virginia, there will be found these three major points of law decided, and no others, to-wit:

> "1. Whether a conveyance of land passes a legal or equitable estate therein is determined by the law of the state where the land is siuated. (R. 143, 14 S. E. (2d) 436).
>
> "2. Where a deed conveyed land to 'R. C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association,' legal title to the land described therein passed to the receiver as an individual. (R. 143, 14 S. E. (2d) 436).
>
> "3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver as an individual, does not pass to his successor by operation of law." (R. 143, 14 S. E. (2d) 436).

Under the West Virginia law, the syllabus is the law decided in the cause.

> "* * * Now our constitution requires the court to make the syllabus, and it is that which is the real decision over the opinion."
>
> *Bank* v. *Burdette*, 61 W. Va., p. 637.

"There is no room for doubt as to the scope of the decision in the Griffin case. The syllabus—(p. 480) which in West Virginia is the law of the case, whatever may be the reasoning employed by the opinion of the court—is as follows * * *."

Kuhn v. *Fairmont Coal Co.*, 215 U. S. p. 356.

The State Court in its opinion did not even dignify the two minor questions discussed in its opinion by making reference to them in its syllabus. It is an evident conclusion that the Court did not regard these two minor subjects, to-wit, the legal right of the receiver of a federal bank to take title by deed to land without the creation of a trust therein, or if any title to land did vest in the receiver in his fiduciary capacity, such title did not pass to his successor receiver by operation of law, because when its attention was called to the omission in the certified bill of complaint to the effect that the funds of the Bank had been used by Robert C. Miller in his representative capacity in the purchase of the lots in question, the Court thereupon stated according to the stipulation (R. 170-171):

"* * *; that said President Judge stated to said counsel for plaintiff that said writ would not be issued and that the allegation and words in said bill of complaint hereinbefore quoted and omitted from said transcript of said bill of complaint, even though correctly shown to said Supreme Court of Appeals of the State of West Virginia, to have been a part of said bill of complaint would not influence and would not have influenced said Court to decide said cause in favor of the plaintiff and would not cause and would not have caused said Court to make any opinion or decision in the cause other than that theretofore made; * * *."

Evidently the State Court regarded these two minor subjects not necessary for the final determination of the

cause, and even if they had been entirely omitted from the Court's opinion, the decision on the whole was conclusive and a finality in the determination of the cause.

VI.

ARGUMENT

POINT 1

NON-FEDERAL GROUNDS

This Court has decided that it has no jurisdiction to review by writ of certiorari the decisions of state courts based on non-federal grounds. Where state courts' decisions are based on adequate non-federal grounds, and the state courts have merely formally determined federal questions, which do not appear to be substantial ones, or which are not necessary for the determination of the cause, this Court is without jurisdiction. These non-federal grounds are discussed in order to establish that they involve only non-federal questions.

(A) THESE FOUR (4) DEEDS, EXHIBITS "P," (R. 69), "Q," (R. 72), "R," (R. 75) AND "S," (R. 77), WITH BILL OF COMPLAINT, ARE NOT AMBIGUOUS

Since these deeds are not ambiguous upon their faces, they speak for themselves and no extrinsic evidence is admissible to aid in their interpretation.

No allegations in the certified bill of complaint or the exhibits therewith can change the terms of an unambiguous deed. If the four (4) deeds could be interpreted by the allegations in the bill of complaint and the exhibits therewith, then titles to real estate would be instable, and any deed, however plain, concise, intelligible and unambiguous in its terms, could be changed by apt allegations.

A deed is a contract and is the repose of the final agreement of the parties, and must be interpreted by the Court in accordance with the terms, provisions and conditions thereof, when it is not ambiguous. No extrinsic matter of any kind can be considered in interpreting unambiguous deeds.

Uhl v. Ohio River Railroad Company, 51 W. Va. pp. 106, 107.

Trans. Co. v. *Pipe Line Co.*, 22 W. Va. p. 614.

Griffin v. Coal Co., 59 W. Va. p. 480.

Jones v. *Coal Co.* 79 W. Va. p. 539.

Paxton v. *Oil Co.*, 80 W. Va. pp. 197, 198.

Strother v. Nat'l. Bank, 113 W. Va. pp. 77, 78.

Collins v. *Treat*, 108 W. Va. p. 443.

Williams Pocahontas Coal Co., v. *Berwind Land Co.*, 76 Fed. p. 323.

Trahern v. Woolwine, 109 W. Va. p. 629.

The State Court in its opinion on this subject stated (R. 147, 14 S. E. (2d) 438):

"It is a well established principle of law that a writing, if not ambiguous, speaks for itself. Parol testimony is not admissible to show the intention of the parties making it. *Uhl* v. *Ohio River Railway Co.*, 51 W. Va. 106, 41 S. E. 340; *Collins* v. *Treat*, 108 W. Va. 443, 152 S. E. 205; *Central Trust Co.* v. *Virginia Trust Co.*, 120 W. Va. 23, 197 S. E. 12. Applying this principle to the deeds before us, they alone, construed under the law of this jurisdiction, determine the status of title to the land in question, since no ambiguity appears therein or could be asserted."

(B) WHEREAS CLAUSES IN THE FOUR (4) DEEDS

The whereas clauses contained in each of the four (4) deeds immediately following the caption in each deed are not covenants between the parties; they are simply recitals and these recitals are for the purpose of showing the authority of the Special Commissioner to make and execute such deeds. The Special Commissioner was appointed by the Court and the recitals in the whereas clauses give information as to the authority of the Special Commissioner to convey property described in each deed.

The fact that Robert C. Miller, Receiver of The National Bank of Fairmont, is plaintiff and the Wheelwright Development Company and others are defendants in a certain chancery cause, heretofore pending in the Circuit Court of Marion County, West Virginia, wherein the Special Commissioner is authorized to sell and convey the real estate involved herein, presents no factual justification whatsoever that Robert C. Miller purchased and took title to the property in each deed in his fiduciary capacity. The fact that Robert C. Miller is acting in his fiduciary capacity as a plaintiff in such chancery cause under which the real estate was sold and conveyed by the Special Commissioner is not a *fortiori* that the Court should conclude that, because Robert C. Miller in his fiduciary capacity acted as plaintiff in such chancery cause, Robert C. Miller, Receiver of The National Bank of Fairmont, as grantee, in each deed, therefore, took title in his fiduciary capacity; such, however, might be good evidence in establishing a trust for the benefit of the Bank.

The fact that Robert C. Miller, Receiver of The National Bank of Fairmont, bid and purchased the property for $2,000.00 in the deed, Exhibit "S," (R. 77), for example, does not show that he received the property by deed of

conveyance in his fiduciary capacity. The fact is that, when the Receiver of The National Bank purchased the property for $2,000.00, the proper conveyance should have been to The National Bank of Fairmont, and again in the second whereas clause, where it states "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association," purchased the property for the sum of $2,000.00, the words "Receiver of the National Bank of Fairmont," are again simply descriptive of the purchaser, Robert C. Miller.

(C) THE VICE OF THE FOUR (4) DEEDS

The grantee in each of the four (4) deeds, Exhibits "P," (R. 69), "Q," (R. 72), "R," (R. 75) and "S," (R. 77), should have been The National Bank of Fairmont, a national banking association. It was error to endeavor to convey the real estate involved in this proceeding to Robert C. Miller, Receiver of The National Bank of Fairmont. If the conveyances had been made to the corporate closed Bank, then the title to the real estate would have been vested in the Bank, and thereby would have been an asset of the closed Bank to be administered by its receiver. The decision of the State Court establishes legal title in Robert C. Miller, individually, and the argument is untenable that the land involved is an asset of the Bank. The lots in question can never become an asset of the Bank, until a trust is established for the benefit of the Bank, and the receiver of the Bank will then have the right to administer them as an asset. The vice of these transactions can now only be cured by a proper chancery cause to establish a trust for the benefit of the closed Bank.

Wittnebel v. *Loughman*, 80 Fed. (2d Series), p. 224; 9 F. Supp. p. 467.

The State Court made this conclusion in its opinion (R. 146, 14 S. E. (2d) 438):

> "An insolvent national bank does not lose its corporate identity by the appointment of a receiver. The *First National Bank of Bethel* v. *The National Pahquioque Bank*, 14 Wall 383, 20 L. Ed. 840. It may still enter into transactions not forbidden by law. 'It is clearly, we think, the intention of the law, that it should continue to exist as a person in law * * *.' *Chemical National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 Sup. Ct. 439; *Hiatt* v. *Warren* (5 C. C. A.) 44 Fed. (2d) 313; *Neely v. Planters National Bank of Clarksdale, Miss.*, 48 Fed. (2d) 266. * * *"

(D) THE PHRASE, "RECEIVER OF THE NATIONAL BANK OF FAIRMONT," IS SIMPLY *DESCRIPTIO PERSONAE* OF THE GRANTEE

In each of the four (4) deeds, the grantee is "Robert C. Miller, Receiver of The National Bank of Fairmont." The phrase, "The Receiver of The National Bank of Fairmont," is simply a descriptive phrase. These words are merely *descriptio personae* and serve no other purpose. In the case of *Hyman* v. *Swint*, 94 W. Va. 627, Syllabus 1 thereof announces the law as to the legal title:

> "Where property is conveyed to one whose name in the deed is followed simply by his official title or name in office, the legal title vests in him individually."

In the remaining part of the same syllabus the law as to the equitable title is also stated:

> "And in the absence of evidence to the contrary, and if no trust appears to have been created by the deed, the grantee also acquires the equitable title."

Under the four (4) deeds, Robert C. Miller acquired the legal title individually, and there being nothing upon the face of the deeds to the contrary and no trust having been created by these deeds, Robert C. Miller also acquired the equitable title, unless a trust can be established for the benefit of the Bank by extrinsic evidence.

Donahue v. *Rafferty*, 82 W. Va. p. 535.

Trust Co. v. *Crawford & Ashby*, 69 W. Va. p. 115.

18 *C. J., Chapter VI, Sec.* 240, pp. 275, 276.

Thompson & Lively v. *Mann*, 53 W. Va. pp. 435, 436.

Hanson v. *Blake, Adm'r.*, 63 W. Va. pp. 560, 561, 562.

Greenfield v. *Stout*, 50 S. E. p. 112.

Hart et al. v. *Seymour et al.*, 35 N. E. 246.

Fowler et al. v. *Coates et al.*, 94 N. E. 997.

Kanenbly et al v. *Volkenberg et al.*, 75 N. Y. S. p. 8.

Title Guarantee & Trust Co. v. *Fallon et al.*, 91 N. Y. S. 497.

Barker v. *Temple Lumber Co.* 12 S. W. (2d) 180.

State v. *Gray*, 111 So. 243.

Love v. *Love et al.*, 83 Pac. 201.

Sansom v. *Ayer & Lord Tie Co.* 139 S. W. 778.

Pfeiffer v. *Rheinfrank*, 2 App. Div. pp. 574, 575, 576; 37 NYS, 1076, 1077, 1078.

Turn the facts around in the instant case and apply them to The National Bank of Fairmont, when it was solvent. Suppose that Mr. M. L. Hutchinson, President of The National Bank of Fairmont, had purchased these lots in question from the Special Commissioner and took title thereto as grantee in this language:

> "M. L. Hutchinson, President of The National Bank of Fairmont, a national banking association."

There is no question that Mr. Hutchinson as such President would have the right to purchase these lots for the Bank, but the fact that he made the purchase would not justify his taking title to the lots in his own name followed by his official title in the Bank. The words "President of The National Bank of Fairmont" would not justify an inference or an implication that a trust was created in these deeds. Under these circumstances, no argument can be advanced justifying that title passed to Mr. Hutchinson in his official capacity. It is obvious that the title passed to Mr. Hutchinson individually, and that the descriptive words following his name are simply *descriptio personae.*

Greenfield v. *Stout*, 50 S. E. p. 112.

The phrase, "Robert C. Miller, Receiver of The National Bank of Fairmont," as grantee in each of the four (4) deeds, would occupy the same legal position as the phrase "M. L. Hutchinson, President of The National Bank of Fairmont," as grantee in the same deeds.

The property right law announced in the two principal cases of *Donahue* v. *Rafferty, supra,* and *Hyman* v. *Swint, supra,* to the effect that words designating the official capacity of the grantee in a deed are only *descriptio personae,* if no trust has been created by the deed, prevails rather universally throughout the states.

Land titles should be left secure as they now exist under property right laws established by the West Virginia Supreme Court in its decisions, which have become *stare decisis*, like the cases of—

Donahue v. *Rafferty, supra,* and *Hyman* v. *Swint, supra.*

The State Court in the instant case dealt with this subject in its opinion briefly and convincingly in this language (R. 147, 14 S. E. (2d) 438):

> "In this state it has been held that where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually. *Hyman* v. *Swint*, 94 W. Va. 627, 119 S. E. 866; *Donahue* v. *Rafferty*, 82 W. Va. 535, 96 S. E. 935. See also, *Pfeiffer* v. *Rheinfrank*, 37 N. Y. S. 1076. We see no reason to change the rule announced in the cases of *Hyman* v. *Swint* and *Donahue* v. *Rafferty*, supra."

(E) THE LAW OF THE SITUS OF REAL PROPERTY, *LEX REI SITAE*, DETERMINES THE VALIDITY OF THE CONVEYANCES THEREOF, WHEREVER MADE

No title will pass and no interest will arise in West Virginia, except as the law, statutory or otherwise, prescribes in that State. The doctrine is well settled that the alienation and transfer of real estate is governed by the law of the state in which the land is situated. This particular part of the opinion of the Supreme Court of Appeals of West Virginia in the instant case (R. 146-147, 14 S. E. (2d) 438) in respect to the conveyance of real estate is pertinent and argues convincingly on this proposition, to-wit:

"However, another question now arises: Does the law of this jurisdiction apply in the construction of a deed conveying land to the receiver of a national bank? It seems that the answer to this question is largely determinative of the result herein. The alienation and transfer of real estate is governed by the law of the state in which the land is located. Olmsted v. Olmsted, 216 U. S. 386, 54 L. Ed. 530, 30 S. Ct. 292, 25 L. R. A. N. S., 1292; In re Barnett, 2 Cir., 12 F. 2d 73; Irving Trust Co. v. Maryland Casualty Co., 2 Cir., 83 F. 2d 168, 111 A. L. R. 781. 'The nature of the interest created by the conveyance is determined by the law of the state where the land is situated.' Restatement of the law, Conflict of Laws, Section 221. Generally, as to the legal effect and interpretation of words used in an instrument conveying land, see Conflict of Laws, supra, Section 214 et seq. It is no longer open to question that the legal effect and interpretation of words used in an instrument conveying land situate in this state are to be measured by the laws of this jurisdiction. Klinck v. Price, 4 W. Va. 4, 6 Am. Rep. 268. This principle is recognized and discussed in the case of Wick v. Dawson, 42 W. Va. 43, 24 S. E. 587. This being true, we look to the laws of this state to determine what title Miller took by the conveyance to him as 'receiver of The National Bank of Fairmont, an insolvent National Banking Association.' "

The subjects under the headings "(A)," "(B)," "(C)," "(D)" and "(E)" hereunder have been discussed in order to show their jural character; that they are not in any sense federal questions; and that they involve purely non-federal grounds adequate and broad enough to sustain the decision as a whole. The instant case involves three major non-federal questions and two other collateral questions, and the non-federal questions decided are severable from, and independent of, the two collateral questions, claimed by petitioner to be federal questions.

Since land titles are determined by the law of the state in which the land is situated, and also since the law of the *situs* determines the validity of the conveyances wherever

made (*Irving Trust Co.*, v. *Maryland Casualty Co.* et al, 84 Fed. R. 168), it logically follows that the judgment of the Supreme Court of Appeals of West Virginia (R. 142) should prevail, because its decision, made purely upon non-federal grounds in respect to the four (4) deeds and the conveyances thereunder, is tantamount to a full and complete determination of the cause.

White v. *Leovy*, Vol. 174 U. S., pp. 95, 96.
Ayres v.*Polsdorfer*, Vol. 187 U. S., p. 584.

Respondent contends that it is settled law that, where the judgment of a state court is predicated upon non-federal and federal grounds, and the non-federal grounds are severable from, and independent of, the federal grounds, and are broad enough to sustain the judgment, this Court will not grant a writ of *certiorari* to review such judgment.

Doyle v. *Atwell*, 261 U. S., p. 592.

Fox Film Corp., v. *Muller*, 296 U. S., pp. 209, 210.

United States v. *Hastings*, 296 U. S., p. 188.

Honeyman v. *Hanan*, 300 U. S., p. 14.

Johnson v. *Risk*, 137 U. S., p. 300.

Adams v. *Russell*, 229 U. S., pp. 358, 359.

McCoy v. *Shaw*, 277 U. S., p. 303.

Ancient Egyptian Order v. *Michaux*, 279 U. S., pp. 744, 745.

POINT 2

FEDERAL GROUNDS

Petitioner claims that these two federal questions are involved in this case:

> One, whether the receiver of a national bank can take title to land by deed without there being created therein a trust for the benefit of the bank as provided under the West Virginia law. *Hyman* v. *Swint, supra*, and *Donahue* v. *Rafferty, supra*, and
>
> Another, whether the present receiver can legally take title to such land by operation of law from a deceased predecessor receiver, if any title to the land vested in such predecessor.

Generally speaking, national banks are subject to non-discriminatory state laws, and especially so in respect to the alienation and transfer of real estate. There would appear to be no conflict between the laws of West Virginia and the asserted right of a receiver of a federal bank to take title to land by deed, when there is created in such deed a trust for the benefit of the bank under Hyman v. Swint, supra, and Donahue v. Rafferty, supra. If no title to the land vests in the receiver of the national bank, because no trust is created in the deed under Hyman v. Swint, supra, and Donahue v. Rafferty, supra, then the second proposition of whether any title in the deceased predecessor receiver vests in the successor receiver by operation of law becomes a moot question.

The whole controversy has arisen in this cause, first by the failure to convey the lots in question to the corporate entity, The National Bank of Fairmont, and when this first error was made, then second, by the failure to create in the four (4) deeds, Exhibits "P," "Q," "R" and "S," a

trust for the benefit of the Bank. No trust being created in these deeds, the title to the lots, under the doctrine of *descriptio personae* of the grantee, was vested individually in Robert C. Miller.

It is again stressed that the acquisition and transfer of real estate is governed by the law of the state in which the real estate is situated, and there is quoted for convenience, an extract from the case of *Nagle* v. *Herold*, 30 F. Supp. 905, in support of this law and therein is a long line of cases cited supporting this law, to-wit:

> "The Seneca National Bank of West Seneca is a national bank. Insofar as its contracts are concerned it is subject to the laws of the State of New York, in which is located. 'National banks "are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than the nation. All their contracts are governed and construed by state laws. *Their acquisition and transfer of property*, their right to collect their debts, and their liability to be sued for debts, are all based on state law. * * *" (*First*) *National Bank* v. *Commonwealth* (*of Kentucky*), 9 Wall. (353), 362 (19 L. Ed. 701).' *McClellan* v. *Chipman*, 164 U. S. 347, 356, 17 S. Ct. 85, 87, 41 L. Ed. 461; *First National Bank* v. *State of Missouri*, 263 U. S. 640, 656, 44 S. Ct. 213, 68 L. Ed. 486. See, also, *Lewis, Rec'r.* v. *Fidelity & Deposit Co. of Maryland*, 292 U. S. 559, 54 S. Ct. 848, 78 L. Ed. 1425, 92 A. L. R. 794."
>
> (Italics Ours)

The case above referred to, *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, (1869), is the early and principal case on this subject and it states the extent that state laws govern national banks:

> "They (national banks) are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the

> nation. All their contracts are governed and construed by State laws. *Their acquisition and transfer of property*, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."
>
> (Italics Ours)

The National Banking Act makes no provision for the receiver of a national bank to take title by deed to real estate purchased by him. The Act makes detail provision for the receiver under certain terms, conditions and limitations to purchase real estate at execution sale with bank funds for the benefit of the bank (U. S. C. A. Title 12 of Sections 198, 199 and 200), and if the Act had contemplated that such receiver take title to real estate so purchased, necessarily the Act would have made apt provision for the receiver to hold title to such real estate and to convey the same under certain defined terms, provisions and conditions. Likewise the Act does not specify in any specific terms the extent to which a successor receiver may take title to real estate, if any could be held by his predecessor receiver. In the instant case, these questions are determined by the laws of West Virginia as enunciated by its Supreme Court.

Abilene National Bank v. *Dolly, Com'r.* 179 Fed. 461; 32 L. R. A. (N. S.) p. 1065.

POINT 3

THE CHANCERY CAUSE PRESENTS A CASE FOR THE ESTABLISHMENT OF A TRUST FOR THE BENEFIT OF THE BANK

The transactions recited in the allegations of the bill of complaint in this chancery cause are persuasive of a trust

in favor of the closed federal Bank under the laws of West Virginia. The remedy is the institution of a new chancery cause or amendment to the original bill of complaint in the old cause for the establishment of a trust in favor of The National Bank of Fairmont, if the Bank's funds were used in the purchase of the lots, and then have the trial Court make disposition thereof according to the state laws.

Obviously, one of the ostensible purposes of this chancery cause is to quiet title. The quieting of title may be only incidental to its main purpose, which is primarily to enforce compliance with the purchase agreement (Exhibit "T" with the bill of complaint, R. 80):

> " * * * But it is nevertheless a rule of these and other cases that where the plaintiff, either in or out of possession, has some equitable right not redressable in a court of law, and removal of cloud is only incidental to the primary relief sought, the bill may be maintained."

Swick v. *Rease*, 62 W. Va. 560.

Under this procedure, the remedy of the Bank would be sure, complete and effective under the general laws of West Virginia and its Official Code 36-1-4.

Upon consideration of the whole case and the record thereof, there appears to have been adequate remedy under the laws of the State of West Virginia for a full determination o fthis case (R. 143, 14 S. E. (2d) 438), and to give the petitioner satisfactory and full relief without incapacitating The National Bank of Fairmont or its Receiver in the discharge of their duties, or destroying their efficiency as federal agencies.

The application of the laws of the State of West Virginia to the present case and the power of that State to enforce them are established in its decision (R. 143, 14 S. E. (2d) 438). The nature of the remedy to be employed by petitioner for the establishment of a trust is also for that State's determination under its laws.

First National Bank in St. Louis, v. *State of Missouri*, 263 U. S. 640.

POINT 4

THE CASE DETERMINED ON CERTIFIED RECORD

Petitioner declares in his supporting brief that it has been the settled practice of the Comptroller of the Currency to take title to real estate by deeds in the name of the receiver in his fiduciary capacity rather than in the name of the bank as a corporation, and then argues that, under *Kennedy* v. *Gibson et al.*, 8 Wall. 498, 506, the receiver is simply an assignee of the bank. The fallacy of this argument is that that case was decided upon the question of the institution of suits for the benefit of the closed federal bank. There can be no assets of a bank, until the bank acquires title thereto. The fact is under the later decisions of this Court, the receiver of an insolvent national bank is defined to be an officer of the executive branch of the government, a creature of the federal statute with prescribed and limited powers, and an agent of the closed federal bank for the purpose of dealing with the bank's assets in behalf of its creditors and stockholders. It is hardly within the province of the Receiver of The National Bank of Fairmont acting as its agent to take title to real estate without the creation of a trust therein contrary to laws of West Virginia.

U. S. C. A. Title 12, Sections 191, 192.

U. S. C. A. Title 12, Sections 198, 199 and 200.

Whelan v. *Blankenbeckler*, 87 F. (2d), 82.

District of Columbia v. *Wardell*, 32 F. Supp. 771.

Schofield v. *Baker*, 212 Fed. p. 504.

If title to land is conveyed by deed to the Receiver of The National Bank of Fairmont in his fiduciary capacity, then the deed must set up a trust for the benefit of the Bank, *Hyman* v. *Swint*, *supra*, and *Donahue* v. *Rafferty*, *supra*. Titles to real estate should be stable and should not stand on the insecure foundation of a mere practice of the Comptroller of the Currency. Land titles under state laws as applied by appellate state courts should be unchangeable, whatever the practice of the Comptroller may be. The record is silent on any practice of the Comptroller in respect to his authorizing deeds for real estate to be taken by his receiver in his fiduciary capacity. This issue could hardly be raised now collaterally, when there is no certified record to support such practice.

VII.

GROUNDS RELIED UPON FOR DISALLOWANCE OF WRIT

The writ of *certiorari* should be denied for these reasons:

(a) Alienation and transfer of real estate are governed by the law of the state in which the land is situated.

(b) This Court is without jurisdiction to review decisions of state courts based on non-federal grounds.

(c) There are no federal questions of substance involved necessary to the determination of the cause.

(d) The judgment of the Supreme Court of West Virginia is adequate and broad enough to sustain the decision, exclusive of the decision on any federal questions.

(e) The non-federal questions are independent of, and severable from, any federal questions asserted.

(f) The claimed federal questions are collateral and subordinate to the three major non-federal questions and are not of sufficient dignity and substance to be considered with a view to reversing the decision of the State Court.

(g) The State Court's decision is based on adequate non-federal grounds and the State Court has merely formally determined the federal questions, which are unsubstantial and unnecessary to the determination of the cause. (*Honeyman* v. *Hanan*, 300 U. S. 14.)

(h) The decision of the State Court on the alleged federal questions does not incapacitate federal banks and their receivers in the discharge of their duties or destroy their efficiency as federal agencies. They should keep and observe state laws in the acquisition and transfer of their property.

(i) There is adequate relief to the petitioner in a chancery cause under the laws of West Virginia to establish a trust for the benefit of The National Bank of Fairmont, if and when it is shown that the Bank's funds were used in the purchase of the lots in question. It is obvious that the decision of the State Court plainly indicates such procedure.

(j) The alleged practice of the Comptroller of the Currency to take title to real estate by deeds in the

name of the receiver in his fiduciary capacity rather than in the name of the bank as a corporation is not involved in the case, since there is no certified record supporting such claim. There is no proof in the record of long continued practice with the knowledge of the Comptroller of the Currency of the execution of receivers' deeds without the creation of a trust therein for the banks. (*Inland Waterways Corporation* v. *Young*, 60 S. C. R. 646, 647; 309 U. S. 517). However, illegality cannot attain legitimacy through practice.

(k) For other reasons apparent upon the face of the certified record of the case.

CONCLUSION

This case does not raise questions of special gravity or general importance.

When all is said and done and this argument is finally concluded, there remain two differences between the contention of the petitioner and the contention of respondent. Petitioner claims that a receiver of a federal bank has the right to take title to land by deed in his fiduciary capacity, contrary to the doctrine of *descriptio personae* of the grantee, (West Virginia Official Code 36-1-11, Appendix 31), and respondent says no, unless a trust for the benefit of the bank is created in such deed. The other difference rests upon a condition. If it is adjudged that a receiver of a national bank has unconditionally the authority to take title to real estate by deed in his fiduciary capacity, then the question arises whether a successor receiver can take title to such real estate by operation of law from a predecessor receiver, and to this proposition respondent says no, unless in the first instance, when such real estate was conveyed by deed to the predecessor receiver, a trust was created therein for the benefit of the

bank. (West Virginia Official Code 36-1-17, Appendix 32). In the last analysis, the simple difference, therefore, between petitioner and respondent is the form of the deed to the receiver. Respondent asserts there should be a covenant in the deed creating a trust for the benefit of the bank, and petitioner urges that no such covenant is necessary under the practice of the Comptroller of the Currency, but there is no certified record in the case in support of any such practice, (U. S. C. A. Title 28, Supreme Court Rules, Section 7 of Rule 11, appended on pages 400-401 thereof), and this question of practice, or any question of practice, by the Comptroller, was not raised before or passed upon by the State Court.

It seems quite obvious that title to real estate purchased by a receiver of a federal insolvent bank out of bank's funds should be taken in the corporate name of the bank, and thereby entirely eliminate all controversies in respect to a federal bank receiver taking title to land by deed and transfr of any such title from a predecessor receiver to a successor receiver by operation of law.

The petitioner has a clear and adequate remedy in chancery for relief in the establishment of a trust for the benefit of his Bank.

Petitioner expresses an apprehension that, if the judgment of the Court below is permitted to stand, where land titles to real estate are acquired by federal bank receivers in their fiduciary capacity and sold by them as such receivers, such judgment will cast doubt upon their stability. The certified record supports no such claim and is silent on this question. However, it is apparent that land titles, if any, disquieted by the judgment of the State Court, will hardly be comparable to the titles unsettled by reversing the property rights law of West Virginia established in these two principal cases, *Donahue*

v. *Rafferty, supra, and Hyman* v. *Swint, supra.* No doubt, many titles are now predicated and held upon the Donahue and Swint cases, supra, and now to overrule these two cases would project a disturbing factor into future litigation and the security of land titles in West Virginia.

The petition for writ of *certiorari* should be denied.

Respectfully submitted,

TUSCA MORRIS
and
ROBERT C. MORRIS,
Counsel for Respondent,
Fairmont Supply Company,
a corporation.

Dated at Fairmont, W. Va.
October 21, 1941.

APPENDIX

U. S. C. Title 12, ch. 2, sec. 198.

Purchase by receiver of property of bank; request to comptroller.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (Mar. 29, 1886, c. 28, sec. 1, 24 Stat. 8.)

U. S. C. Title 12, ch. 2, sec. 199.

Approval of request.

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall

be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsment of approvals, shall be filed with the Treasurer of the United States. (Mar. 29, 1886, c. 28, sec. 2, 24 Stat. 8.)

U. S. C. Title 12, ch. 2, sec. 200.

Payment.

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currncy shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: Provided, however, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order. (Mar. 29, 1886, c. 28, sec. 3, 24 Stat. 8).

West Virginia Official Code 36-1-11:

"When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will."

West Virginia Official Code 36-1-17:

"Whenever, by reason of any conveyance by written instrument or by will, the bare legal title to real or personal property is held by one person for the use or benefit of, or in trust for, another person mentioned or described in the instrument or will, and the holder of such legal title has no active duties of care or management or disposition of the property by reason of such trust, or has performed all such duties as were imposed upon him, the legal title to the same estate or interest which he had in the use of such property shall pass to and be legally deemed to be in the person for whose use or benefit or in trust for whom, the legal title to the property was so held.

Office - Supreme Court, U. S.
FILED
NOV 5 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 669.

HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
Petitioner,

v.

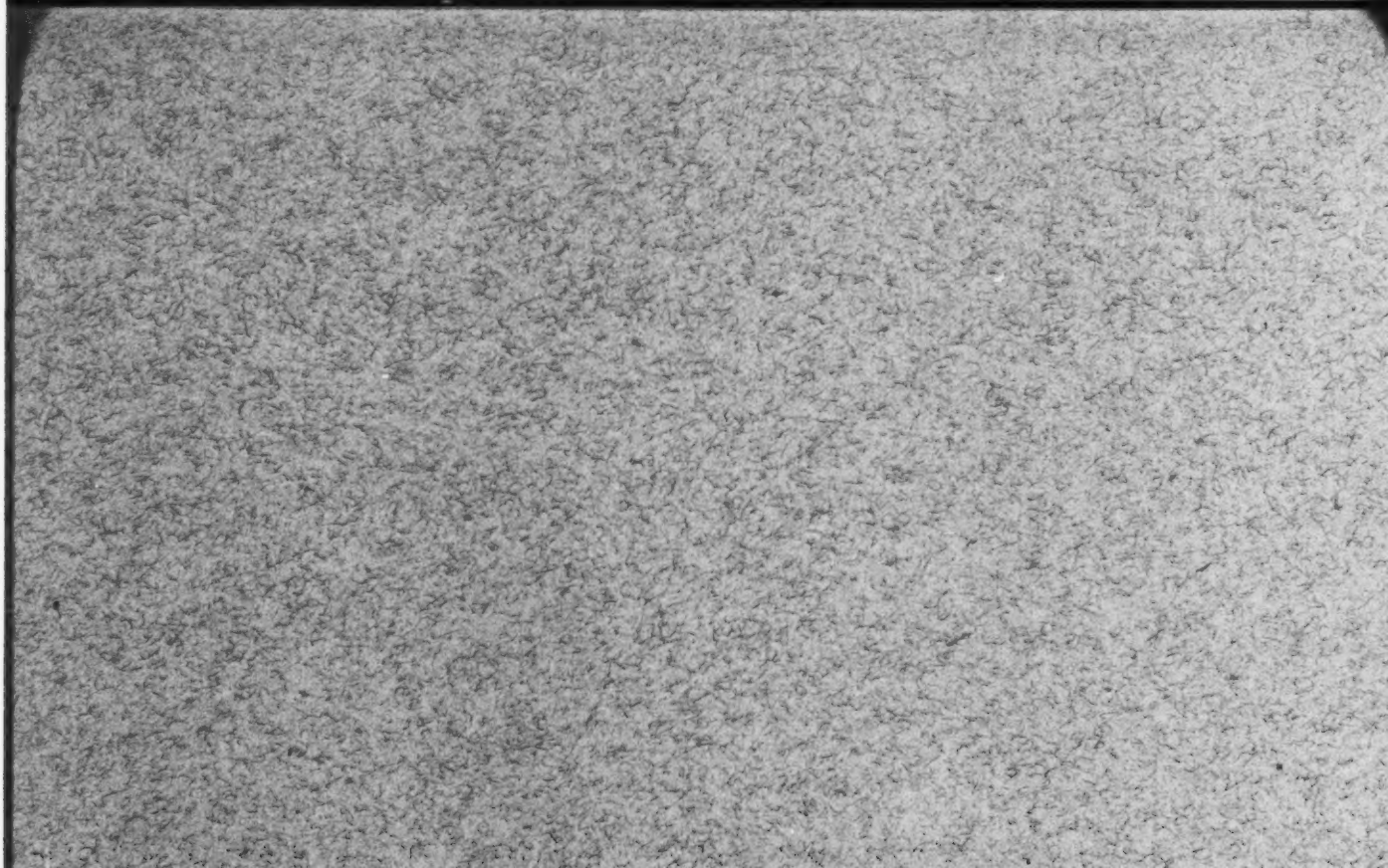
FAIRMONT SUPPLY COMPANY, A CORPORATION.

REPLY BRIEF ON BEHALF OF PETITIONER.

GEORGE P. BARSE,
Counsel for Petitioner.

JOSEPH A. MEREDITH,
HERSCHEL ROSE, JR.,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX

Subject Index

	Page
I—Finality of Judgment	1
II—Federal Questions	2
A. Federal Questions Presented by Petitioner	2
B. Respondent's Contentions as to Federal Questions	3
C. Petitioner's Reply to Foregoing Contentions of Respondent	4
III—Conclusion	12
Appendix	14

Cases Cited

Ancient Egyptian Order v. Michaux, 279 U. S. 737	6
Carter v. Texas, 177 U. S. 442	6
Cook County National Bank v. United States, (1882) 107 U. S. 445	7
Cooper v. O'Connor, (App. D. C., 1938) 99 F. (2d) 135, cert. den. 305 U. S. 643	7
Cooper v. O'Connor, (App. D. C., 1939) 105 F. (2d) 761	7
Davis v. Elmira Savings Bank, (1896) 161 U. S. 275	7
First National Bank v. Anderson, 269 U. S. 341	6
Great Northern Ry. v. Washington, 300 U. S. 154	6
Green Bay Canal Co. v. Patten Paper Co., 172 U. S. 58	9
Gross v. United States Mortgage Co., 108 U. S. 477	10
Indiana ex rel. Anderson v. Brand, 303 U. S. 95	10
In re Chetwood, (1897) 165 U. S. 443	7
Jennings v. U. S. F. & G. Co., (1935) 294 U. S. 216	7
Jones National Bank v. Yates, 240 U. S. 541	9
Kennedy v. Gibson, et al., (1869) 8 Wall. 498	7
Lovell v. Griffin, 303 U. S. 444	6
Norris v. Alabama, 294 U. S. 587	6
Philadelphia Fire Association v. New York, 119 U. S. 110	10

Page

Pufahl v. Parks, (1936) 299 U. S. 217 7
Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113 6
Truax v. Corrigan, 257 U. S. 312 6
U. S. v. Weitzel, (1918) 246 U. S. 533 7
Ward v. Love County, 253 U. S. 17 6
Yonkers v. Downey, (1940) 309 U. S. 590 7

STATUTES CITED

12 U. S. C., Secs. 198-200 ..... 8, 9
Rule 41, Revised Rules of the Supreme Court of the United States 10

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 669.

HOWARD HARDESTY, AS RECEIVER OF THE NATIONAL BANK OF FAIRMONT, WEST VIRGINIA,
Petitioner,

v.

FAIRMONT SUPPLY COMPANY, A CORPORATION.

REPLY BRIEF ON BEHALF OF PETITIONER.

I.

FINALITY OF JUDGMENT.

Respondent seems to agree with Petitioner that the judgment of the Court below is final, and that it was thereunder adjudicated that neither Petitioner, in his fiduciary capacity as Receiver, nor the insolvent bank as a corporation, acquired title to the real estate by the transactions in question. The following extracts from Respondent's brief are in point:

> (P. 4): "The above quoted parts of the Court's opinion definitely decided the chancery cause."
> (P. 7): "Finality to the cause was achieved, when the three major questions were adjudicated."

(P. 13): " * * * The decision of the State Court establishes legal title in Robert C. Miller, individually, *and the argument is untenable that the land involved is an asset of the Bank.* The lots in question can never become an asset of the Bank, until a trust is established for the benefit of the Bank, and the Receiver of the Bank will then have the right to administer them as an asset. *The vice of these transactions can now only be cured by a proper chancery cause to establish a trust for the benefit of the closed Bank.*" (Italics inserted).

II.

FEDERAL QUESTIONS.

A. Federal Questions Presented by Petitioner.

For convenience of reference, Petitioner repeats, here, the Federal questions set forth on pages 9-10 of his petition:

"(1) Under the national banking laws, as construed by the courts, does the receiver of a national bank who has been duly authorized to purchase real property on behalf of his receivership, have capacity and power to take title to said property in his name, in his fiduciary and representative capacity, as receiver of said bank, or must said title in terms be conveyed to, and in the name of, the receivership bank as a corporation, in order to avoid the consequence of title passing to said receiver in his individual and personal capacity?

"(2) Upon the death or resignation of a receiver of a national bank, do the receivership assets pass, by operation of the national banking laws, from the predecessor receiver to his successor?

"(3) Does the law of West Virginia, to the effect that: 'Where a conveyance is made to a person whose name is followed by an official title or name of office, the title or office is merely *descriptio personae* of the grantee and title vests in the grantee individually', apply to deeds purporting to convey title of real property to a national bank receiver in his fiduciary or representative capacity as receiver?"

B. Respondent's Contentions as to Federal Questions.

Respondent contends in its brief that the decision of the court below *was based on adequate non-federal grounds,* and that the questions presented by petitioner, as federal questions, were entirely collateral to the main issues, and were not necessary to the disposition of the case. Respondent's position in these respects is summarized, in substance, on pages 2-4 of its brief, the pertinent portions of which, are, for convenience of reference and consideration, here quoted:

> "(1) Whether under the laws of the State of West Virginia, the three points of law decided in the judgment (R. 142) of the Supreme Court of West Virginia and stated in its syllabus of the case, to wit:
>
> " '1. Whether a conveyance of land passes a legal or equitable estate therein is determined by the law of the state where the land is situated.
>
> " '2. Where a deed conveyed land to "R. F. Miller, receiver of The National Bank of Fairmont, an insolvent national banking association", legal title to the land described therein passed to the receiver as an individual.
>
> " '3. Upon the death of a receiver of an insolvent national banking association, legal title to land, held by the receiver as an individual, does not pass to his successor by operation of law.' (R. 143, 14 S. E. (2d) 436),

are non-federal questions and the decision upon them is broad enough to maintain the judgment and constitutes a full and final determination of the cause.

> "(2) Whether the collateral questions discussed in the opinion of the Court (R. 142), but not decided in or referred to in its syllabus, to wit:
>
> 1—That the Receiver of The National Bank of Fairmont is without authority to take title by deed to the real estate involved, when and if purchased by him in his fiduciary capacity, unless a trust is created therein in favor of the Bank, and

2—That the present Receiver, petitioner herein, of The National Bank of Fairmont is without authority to take title to such real estate by operation of law from his deceased predecessor, if any title to the land vested in his predecessor receiver. (R. 143, 14 S. E. (2d) 438),

are federal questions, and, if found to be federal questions, whether their disposition is necessary or unnecessary for a final determination of the cause."

Respondent further states:

"When the Supreme Court of West Virginia rendered its opinion in these three major particulars (referring to the decided points epitomized in the foregoing syllabus of the court below) there was eliminated any and all federal questions of substance, * * *" (Brief p. 3-4).

C. Petitioner's Reply to Foregoing Contentions of Respondent.

(a) Respondent's Alleged Collateral Questions.

It will be observed that the alleged "collateral questions" numbered 1 and 2 set forth by respondent at the top of page 3 of its brief and hereinabove quoted (*supra*, pp. 3-4) are, in substance and effect, a restatement of questions (1) and (2) set forth under "Questions Presented" on pages 9 and 10 of Petitioner's Brief, and hereinabove quoted (*supra*, pp. 2-3).

It will further be observed that these alleged "collateral questions" are, in effect, the same questions answered by the court below but modified by reason of the application of the law of West Virginia, as indicated by said numbered points (2) and (3) of the syllabus of the court below (quoted, *supra*, p. 3).

It is obvious, therefore, that said numbered questions (1) and (2) as thus presented by petitioner, and denominated by respondent "collateral questions" (brief p. 3) are not "collateral questions" but, on the contrary, they concern the disputed issues of title, and constitute the primary questions presented to the court below for determination.

(b) Respondent's Contentions as to Alleged Major Non-Federal Questions.

Respondent treats the said three paragraphs of the syllabus of the court below and the two alleged collateral questions as constituting five questions, notwithstanding the two alleged collateral questions are, in effect, the same as said numbered points (2) and (3) of said syllabus. Respondent then takes the position that the three questions embraced within said syllabus constitute major "non-federal questions". Respondent further contends (Brief pp. 4-5) that when the court below decided said three alleged "non-federal questions", said remaining two "collateral" questions, although passed upon by the court below, "neither add to nor subtract from the decision on the three main questions. They lack the force of adjudication." (Brief p. 5).

However, on page 26 of its brief, respondent states:

> "(g) The State Court's decision is based on adequate non-federal grounds and the State Court has merely formally determined the federal questions, which are unsubstantial and unnecessary to the determination of the cause."

Respondent is inconsistent in the position thus taken. Said "collateral" questions numbered (1) and (2) and thus conceded by the foregoing quoted statement as "formally determined * * * federal questions" apparently become "non-federal questions" under numbered points or questions (2) and (3) in the syllabus of the court below.

In other words, respondent's position apparently is that said two "collateral" federal questions are converted into non-federal questions solely by reason of the fact that in deciding said two federal questions the court below applied the law of West Virginia rather than the national banking laws.

Numbered question 3, as presented by petitioner on page 10 of its petition (and quoted herein, *supra*, p. 2) involves the issue of whether, on the one hand, the law of West Virginia, or, on the other hand, the national banking laws, shall

determine whether petitioner's predecessor acquired title to the land in question in his representative capacity. The court below decided said question, and held that the law of West Virginia should control. Its decision to that effect comprises numbered paragraph (1) of its syllabus, but, as indicated, it is a decision of Petitioner's question numbered (3).

The question of whether state law, or the national banking law, should govern the primary issues of title presented in the instant case, is itself a federal question. Obviously, determination by the state court that state law should control, does not, as hereinbefore indicated, convert federal questions into non-federal questions; nor does such decision by the state court oust This Court of jurisdiction to review the questions presented. If such doctrine were to be applied, This Court would be deprived of jurisdiction to entertain review. See *First National Bank* v. *Anderson*, 269 U. S. 341, 346; *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 744-745; *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 121; *Carter* v. *Texas*, 177 U. S. 442, 447; *Truax* v. *Corrigan*, 257 U. S. 312, 324-325; *Norris* v. *Alabama*, 294 U. S. 587, 590; *Great Northern Ry.* v. *Washington*, 300 U. S. 154, 166; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Ward* v. *Love County*, 253 U. S. 17, 22.

(c) *Nature of the Federal Questions Presented, in View of the Controlling Effect of National Banking Law in the Instant Case.*

Petitioner does not deny the *general doctrine* that ordinarily the law of the situs, *i. e.*, the law of the state where land is located,—governs questions concerning acquisition of title to land including questions of succession to title upon the death of the land owner. However, it would seem clear that if, either by express provision of the national banking statutes or by implementation of said statutes by court decisions interpreting and construing the same, the issues in the instant case are embraced within the provisions and requirements of the national banking laws as thus implemented, the general doctrine concerning the law of

the situs must give way to the paramount provisions of the national banking law as applied to the particular situation presented. It is, of course, settled doctrine that the national banking laws, as interpreted and construed by the courts, constitute a complete system covering not only the organization but also the liquidation in receivership, of national banks, and that state laws cannot be effective when in conflict with the national banking law, or where the state law, if applied, would defeat the purposes of the national banking law.

Cook County National Bank v. *United States,* (1882) 107 U. S. 445, 448;
Jennings v. *U. S. F. & G. Co.,* (1935) 294 U. S. 216, 226;
Davis v. *Elmira Savings Bank,* (1896) 161 U. S. 275, 283;
Yonkers v. *Downey,* (1940) 309 U. S. 590, 596.

It is also settled doctrine that receivers of national banks are officers of the United States and agents of the Comptroller of the Currency, and derive their authority and power and capacity to act from the national banking law (as implemented by court decisions), subject, of course, to appropriate instructions from the Comptroller of the Currency.

Kennedy v. *Gibson, et al.,* (1869) 8 Wall. 498, 504-506;
In re Chetwood, (1897) 165 U. S. 443, 458;
U. S. v. *Weitzel,* (1918) 246 U. S. 533, 541;
Pufahl v. *Parks,* (1936) 299 U. S. 217, 225;
Cooper v. *O'Connor,* (App. D. C., 1938) 99 F. (2d) 135, 139, *cert.* den. 305 U. S. 643;
Cooper v. *O'Connor,* (App. D. C., 1939) 105 F. (2d) 761, 763.

Petitioner's Claims Under the National Banking Law.

Having in mind the foregoing doctrines, and weighing and evaluating petitioner's claims of title in the light thereof, the situation appears to be:

(1) Assuming petitioner's predecessor receiver,—Miller,—acting under the authority of the national banking law

(Sections 198-200 of title 12 U. S. C.), (See Appendix hereof) and by direction of the Comptroller of the Currency and with the approval of the Secretary of the Treasury,—purchased the land in question at execution sale, and paid for the same from the funds of the receivership bank,—did said receiver Miller have capacity to take title to said property in his name in his fiduciary and representative capacity, as receiver of the bank, or was it necessary that title in terms be conveyed to, and in the name of, the receivership bank as a corporation, in order to avoid the consequence of title passing to said receiver in his individual and personal capacity?

The court below, as to this question, decided that under the deeds of the Special Commissioner purporting to convey said lands to "Robert C. Miller, Receiver of The National Bank of Fairmont, an insolvent national banking association," title did not pass, either to said Miller in his fiduciary or representative capacity as receiver, for the benefit of the bank, nor to said bank as a corporation; and further, that title passed to said Miller in his individual capacity. (R. 148)

(2) Assuming, however, for discussion, that title under said deeds *did pass to said Miller in his fiduciary and representative capacity as receiver,* did said title,—upon the death of said Miller, pass, by operation of the national banking laws, from said Miller to petitioner as successor receiver.

The court below, in effect, held as to this question that inasmuch as there was "no statute which authorizes a receiver of a national banking assiciation to take title from his deceased predecessor by operation of law", (R. 148) title did not pass to petitioner as successor receiver but passed to the heirs of said Miller. (See previous discussion, Petition p. 8)

Petitioner, in his bill of complaint, set forth in detail:—the circumstances and proceedings under which he claimed that his predecessor receiver,—Miller,—had acquired title to the lands in question; refusal

of respondent to accept deeds on the ground of alleged lack of title for the reasons specified (and subsequently reiterated by respondent in its demurrer to the bill of complaint); and thereupon petitioner, in numbered paragraph 7 of the bill of complaint (R. 14-15) affirmatively claimed that by virtue of the facts and circumstances and proceedings set forth in the bill of complaint,—petitioner's predecessor did acquire title to said lands in his fiduciary and representative capacity as receiver and further that said title passed to petitioner as successor receiver.

It is obvious that Petitioner was claiming, specifically, title rights to the land in question, in his official capacity as receiver of a national bank, (a) in reliance upon acts taken under national banking law (Sections 198-200, title 12, U. S. C.) by his predecessor receiver Miller, in purchasing the property with receivership funds, and (b) under right of succession to title by operation of the national banking law.

Discussion under the next topic will indicate that while a specific right or claim must be asserted it is not necessary that specific reference to the statute be made.

(d) *Sufficiency of Disclosure of Federal Questions By the Record.*

It is settled law that it is not necessary that one who is claiming a right under a Federal statute, must, in terms, name or specify the particular Federal statute under which the claim is asserted. *If the decision of the case required the consideration and application of the Federal statute to support the claim, the Federal question has been sufficiently raised. Jones National Bank* v. *Yates*, 240 U. S. 541, 550-551; *Green Bay Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67. It is not open to question that it was necessary to consider the interpretation and construction and effect of national banking laws to decide the two primary issues in the instant case, to wit,—whether title passed to petitioner's predecessor, Miller, in his fiduciary and representative ca-

pacity and whether petitioner succeeded to the title of Miller, as Receiver, upon the death of Miller.

Rule 41 of the Revised Rules of This Court require that the transcript of record shall include, *inter alia*, the opinion of the court below. It is settled doctrine, in view of this requirement, that This Court may examine the opinion of the court below to determine the existence and the nature of the alleged Federal question presented to This Court for review and to determine whether substantial Federal questions were actually presented to and passed upon by the court below in deciding the case. *Indiana ex rel Anderson* v. *Brand*, 303 U. S. 95, 98-99; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 116; *Gross* v. *United States Mortgage Co.*, 108 U. S. 477, 486.

(e) *Opinion of the Court Below Discloses That Substantial Federal Questions Were Presented to and Decided by the Court Below.*

The following extracts from the opinion of the court below definitely establish that the three federal questions enumerated by petitioner (Petition pages 9-10) were presented to, passed upon, and decided by, the court below:

> "In order that the questions involved in this certificate may be properly discussed, it is necessary to consider the effect of the appointment of a receiver for a national banking association by the Comptroller of the Currency, as well as the authority and powers of the receiver so appointed.
>
> "When a national bank becomes insolvent and the Comptroller of the Currency takes charge of its affairs and appoints a receiver, all its assets pass to the possession and control of the receiver in trust to reduce the same to money and apply them as directed by the National Banking Act. U. S. C. A. Title 12, Sections 192 and 194; *Anderson* v. *Cronkleton* (C. C. A. Neb. 1929), 32 Fed. (2d) 170. The receiver of a national banking association has the power to purchase real estate under the direction of the Comptroller of the Currency, when such is necessary to protect the assets of

the insolvent bank. U. S. C. A. Title 12, Sections 198, 199 and 200.

"An insolvent national bank does not lose its corporate identity by the appointment of a receiver. *The First National Bank of Bethel* v. *The National Pahquioque Bank*, 14 Wall. 383, 20 L. Ed. 840. It may still enter into transactions not forbidden by law. 'It is clearly, we think, the intention of the law, that it should continue to exist as a person in law, * * *.' *Chemical National National Bank* v. *Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 Sup. Ct. 439; *Hiatt* v. *Warren* (5 C. C. A.) 44 Fed. (2d) 313; *Neely* v. *Planters National Bank of Clarksdale, Miss.*, 48 Fed. (2d) 266. It would seem that the powers of a receiver of a national banking association and his capacity to control and deal with the assets thereof are well and fully defined." (R. 145-146)

* * * * * * * * *

"In the case of *Rinehart, Receiver* v. *Ireland*, 120 W. Va. 599, 199 S. E. 871, also cited by counsel, this Court had under consideration the question of the powers of the receiver of a state bank. The statute which measures the power and authority of the receiver of a state bank is not in terms the same as the statute which defines the powers and authority of the receiver of a national bank. The law under which the receiver of a state bank operates, provides that he shall have all the powers vested in special receivers by general law, thus giving the receiver of a state bank appointed under Code, 31-8-32, wider powers than those given to the receiver of a national bank. The receiver of a national bank is an agent whose authority is limited by law. *Whelan* v. *Blankenbeckler* (5 C. C. A.), 87 Fed. (2d) 81; *Scott* v. *Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059.

"Miller had the power to purchase the real estate here in question, if the protection of the assets of the insolvent association required the same. However, if he used the funds of his trust in purchasing such real estate, he did not have authority to take title to the property in his own name. Since Miller was apparently acting in a fiduciary capacity as receiver of the bank, he exceeded his authority in accepting the deeds herein mentioned, and the legal title to the real estate vested in him individually. We are not aware of any statute

which authorizes the receiver of a national banking association to take title from his deceased predecessor by operation of law. There being no such statutory provision, the legal title, upon the death of Miller, passed to his heirs by the laws of descent prevailing in this jurisdiction." (R. 147-148)

* * * * * *

"However, another question now arises: Does the law of this jurisdiction apply in the construction of a deed conveying land to the receiver of a national bank? It seems that the answer to this question is largely determinative of the result herein. The alienation and transfer of real estate is governed by the law of the state in which the land is located." (R. 146)

III.

CONCLUSION.

Petitoner respectfully submits:

(1) That the judgment of the court below is final, for purpose of review by This Court on petition for writ of *certiorari.*

(2) That the questions specified on pages 9-10 of the petition, constitute substantial federal questions which were effectively raised upon the record, and which were presented to and decided by the court below in rendering the judgment now sought to be reviewed.

(3) That the record sufficiently establishes, for purpose of review:

(a) That the lands in question were purchased by petitioner's predecessor,—Robert C. Miller, as receiver of The National Bank of Fairmont, West Virginia, under authority of the national banking laws (Sections 198-200, Title 12, U. S. C.) by direction of the Comptroller of the Currency, with the approval of the Secretary of the Treasury, and that said lands were paid

for by said Miller, as receiver, from the funds of the receivership bank.

(b) That title to said lands passed to said Miller in his fiduciary and representative capacity as receiver, and did not pass to said Miller in his individual capacity.

(c) That after the death of said Miller, title to said lands passed, by operation of the national banking laws, from said Miller as receiver, to petitioner as successor receiver.

(d) That the judgment of the court below deprives petitioner of property rights asserted by him as receiver under the national banking laws.

(4) That the petition for *certiorari* should be granted.

Respectfully,

GEORGE P. BARSE,
Counsel for Petitioner.

JOSEPH A. MEREDITH,
HERSCHEL ROSE, JR.,
Of Counsel.

APPENDIX.

U. S. C. Title 12, ch. 2, sec. 198

Purchase by receiver of property of bank; request to comptroller.

Whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale. (Mar. 29, 1886, c. 28, sec. 1, 24 Stat. 8.)

U. S. C. Title 12, ch. 2, sec. 199

Approval of request

Such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. (Mar. 29, 1886, c. 28, sec. 2, 24 Stat. 8.)

U. S. C. Title 12, ch. 2, sec. 200

Payment

Whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: *Provided, however*, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order. (Mar. 29, 1886, c. 28, sec. 3, 24 Stat. 8.)